Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

# double jeopardy, pleas and verdicts

Working Paper 63

Canada

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# DOUBLE JEOPARDY, PLEAS AND VERDICTS

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# DOUBLE JEOPARDY, PLEAS AND VERDICTS

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# Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street, 7th Floor
Ottawa, Canada
K1A 0L6

# Commission

Mr. Justice Allen M. Linden, President*
Mr. Gilles Létourneau, Vice-President*
Mr. John Frecker, Commissioner
Her Honour Judge Michèle Rivet, Commissioner*

## Secretary

François Handfield, B.A., LL.L.

## Co-ordinator, Criminal Procedure

Stanley A. Cohen, B.A., LL.B., LL.M.

## Consultants

Glenn A. Gilmour, B.A., LL.B.
James C. Jordan, B.A., LL.B., LL.M., LL.D.

## Special Adviser

Martin Friedland, Q.C.

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* At the time this Working Paper was approved, Mr. Justice Linden was President, Mr. Létourneau was Vice-President and Judge Rivet was still a member of the Commission. Mr. Létourneau was appointed President of the Commission on July 6, 1990.

# Foreword

We are indebted to all those individuals consulted during the preparation of this Working Paper. Without their help, this Paper would have been more imperfect than it is. Members of our standing advisory panels, comprising representatives of the judiciary, the practising bar (both Crown and defence), law teachers and the police, regularly advise us on our work in development. We are truly grateful to all of them and hereby acknowledge their enormous influence on our work.

We also wish to thank the current and past Ministers of Justice and their Deputies, Solicitors General and their Deputies, and Members of Parliament who have been involved in our work, for their encouragement and support. Needless to say, the views contained in this document do not necessarily reflect those of Parliament, the Department of Justice or any of the individual consultants.

In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights*, we have conscientiously endeavoured to draft this Working Paper in gender-neutral language. In doing so, we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* pertaining to the drafting of laws, since the Commission's mandate is to make proposals for modernizing Canada's federal laws.

# Table of Contents

# INTRODUCTION

> The history of the rule against double jeopardy is the history of criminal procedure. No other procedural doctrine is more fundamental or all-pervasive.[1]

Why is protection against double jeopardy such a central feature of our criminal justice system? "The main rationale of the rule against double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions."[2]

> The underlying idea ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[3]

A person charged with a crime may be found guilty of it and subjected to punishment for committing it once only.

Given the importance of "guilt" in criminal law, it is of undoubted importance for a Code of Criminal Procedure to ensure that there are appropriate and fair mechanisms for deciding guilt. An accusation of criminal conduct against a person is no guarantee that the accused committed the crime. After all, the accusation may be false, and even if it is true a process of inquiry is still required to prove its truth. Otherwise, punishment could be imposed merely on the basis of an accusation — a concept repugnant to any fair system of criminal justice. The accused must therefore have the opportunity to respond formally to the accusation — in other words, to plead not guilty or guilty to it in a court of law. In this way the validity of the charge can be determined, if need be, at a trial.

As will be seen, the pleas of guilty and not guilty are not the only pleas now available under the law. An accused may instead invoke double jeopardy by saying, in essence, "I have already been acquitted (or convicted) of this charge." And in

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1. M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969) at 3. For a recent discussion of double jeopardy in Canada, see C.D. Freeman, "Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and a Current Controversy" (1988), 12 *Crim. L.J.* 3.

2. Friedland, *supra*, note 1 at 3-4.

3. *Green* v. *United States*, 355 U.S. 184 (1957) at 187-88.

   The Commission has previously examined what "guilt" entails in the criminal law and has proposed a new Criminal Code that incorporates this conception of guilt. See Law Reform Commission of Canada [hereinafter LRC], *The Meaning of Guilt: Strict Liability*, Working Paper 2 (Ottawa: Information Canada, 1974); *Recodifying Criminal Law — A Revised and Enlarged Edition of Report 30*, Report 31 (Ottawa: The Commission, 1987).

defamatory libel cases the accused may be heard to plead, "I am not guilty because what I published was true and was published for the benefit of the public."

Similarly, it is not surprising to find that verdicts other than those of guilty and not guilty are available in appropriate circumstances. For example, a judge or jury may, on sufficient evidence, find an accused not guilty of a crime by reason of insanity. These verdicts too are matters that will be analysed and explored in the pages that follow.

The purpose of this Working Paper is to examine the protections against double jeopardy and the pleas and verdicts found in the present law. We will then consider whether reform is necessary to ensure consistency with the general principles of criminal procedure explained in Report 32, *Our Criminal Procedure*.[4] In discussing these issues we have endeavoured to provide recommendations that render the law more understandable, rational and comprehensive.

4. LRC, *Our Criminal Procedure*, Report 32 (Ottawa: The Commission, 1988).

# CHAPTER ONE

# Present Law

## I. Double Jeopardy

### A. Introduction

Two latin maxims are often used to express the rules against double jeopardy: (a) *nemo debet bis vexari pro una et eadem causa* (No man ought to be twice troubled or harassed for one and the same cause) and (b) *nemo debet bis puniri pro uno delicto* (No man ought to be punished twice for one offence).

The present *Criminal Code*[5] contains specific provisions to protect against double jeopardy. Foremost among these are the special pleas in bar of *autrefois acquit* and *convict*. These pleas serve a different purpose from the usual pleas of not guilty and guilty. Instead of answering the charge, these special pleas bar proceedings where the accused has been previously prosecuted for and acquitted (or convicted) of the same crime. However, these pleas are but one means of protecting against double jeopardy. Related to these are other defences recognized by the common law and developed by the courts, such as the rule against multiple convictions and the rule against inconsistent judgments (also called issue estoppel), which are also designed to protect an accused from being placed in jeopardy twice. These pleas and defences ensure the finality of criminal proceedings in order to prevent the harassment of an accused by means of repeated state prosecutions. However, statute law and common law, even when taken together, do not exhaust the means of protecting against double jeopardy. Important residual protection is to be found in the Constitution.

There are thus a variety of rules to be examined: (a) the special pleas in bar; (b) the rule against unreasonably splitting a case; (c) the rule against multiple convictions; (d) the rule against inconsistent judgments (issue estoppel); (e) other miscellaneous provisions, such as section 11 of the *Code*; and (f) the constitutional protection against double jeopardy set out in section 7 and subsection 11(*h*) of the *Canadian Charter of Rights and Freedoms*.[6] Often these rules are referred to as being aspects of the doctrine

5. R.S.C. 1985, c. C-46.

6. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

of *res judicata* (i.e., that following a final judgment, the same cause or matter cannot be relitigated).

However, this Working Paper does not address one issue often discussed in relation to double jeopardy: whether protection against double jeopardy should prevent the Crown from appealing against an acquittal.[7] Under the present *Code*, the Crown may appeal against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground that involves a question of law alone. If the appeal is allowed, the court of appeal may order a new trial or enter a verdict of guilty. (If the trial was before a judge and jury, the court of appeal must order a new trial.[8]) This is an issue that will be addressed in our forthcoming Working Paper on *Criminal Appeal Procedure*.

## B. Sources of Double Jeopardy Protection

### 1. The Special Pleas in Bar: *Autrefois Acquit, Autrefois Convict*, and Pardon

The special pleas of *autrefois acquit* and *autrefois convict* provide limited protection against double jeopardy. *Autrefois acquit* has been defined as "the special plea by virtue of which the principles of estoppel are applied by the criminal law to preclude a second prosecution of an accused person for a crime in respect of which he has been acquitted in previous proceedings."[9] In other words, since the court has conclusively decided in favour of the accused, the same matter cannot be retried in a subsequent prosecution that could come to the opposite conclusion. In contrast, "the plea of *autrefois convict* is the process by which the doctrine of merger in judgment[10] becomes effective in criminal jurisdiction. Once the accused has been tried for an offence and convicted of it, that is an end to his criminal liability, and his conduct cannot serve as the basis of a second accusation of the same crime."[11]

The *Code* contains specific provisions respecting these special pleas. Subsections 607(1), (3), (4) and (5) set out that the accused may plead *autrefois acquit, autrefois convict*, or pardon; that these pleas shall be disposed of by the judge without a jury before the accused is called on to plead further; that where these pleas are not successful, the accused may plead guilty or not guilty; and that it is sufficient, in pleading *autrefois acquit* or *autrefois convict*, to state that the accused has been lawfully acquitted, convicted, or discharged pursuant to subsection 736(1), of the offence charged, and to indicate the time and place this occurred. Section 608 provides that

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7. See Friedland, *supra*, note 1 at 279-311; Freeman, *supra*, note 1 at 19-27.

8. *Criminal Code*, paras. 676(1)(*a*), 686(4)(*b*).

9. G. Spencer Bower and A.K. Turner, *The Doctrine of Res Judicata*, 2d ed. (London: Butterworths, 1969) at 267.

10. The doctrine of merger in judgment means that the issues raised at trial are merged into the judgment and so cannot be relitigated.

11. Spencer Bower and Turner, *supra*, note 9 at 391.

where an issue on the plea of *autrefois acquit* or *autrefois convict* is being tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 551 on the charge that is pending before that court are admissible in evidence to prove or disprove the identity of the charges.

Section 609 sets out what determines identity of charges. When *autrefois acquit* or *autrefois convict* is pleaded to a count, subsection 609(1) provides (a) that where the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and (b) that on the former trial, if all proper amendments had been made that might then have been made, the accused might have been convicted of all the offences of which he may be convicted on the count to which the plea of *autrefois acquit* or *autrefois convict* is pleaded, the judge shall give judgment discharging the accused in respect of that count.

Clearly, subsection 609(1) applies if the crime charged is the same as one for which the accused has been previously acquitted or convicted. Moreover, it applies if the crime charged was a permissible alternative verdict on the first charge, either as an attempt under section 660, as an included crime under subsection 662(1), or as a crime specified in subsections 662(2), (3), (4), (5) or (6).[12] The provision also applies where the crime subsequently charged is one for which the accused might have been put in peril originally had amendments been properly made (meaning amendments made pursuant to section 601). For example, where the accused is tried for a crime alleged to have been committed on a particular but incorrect date and is acquitted, a subsequent prosecution for the same crime on the correct date is precluded because there is a power to amend where there is a variance between the count and the evidence adduced.[13] The plea is not available where the subsequent crime is one that could have been included by drafting the count in such a way as to include it, but was not because the courts have no power to order such an amendment.[14]

Under subsection 609(2), where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial. Where the accused could not have been convicted of the offence on the former trial, the accused must plead guilty or not guilty. Jerome Atrens argues that this adverts to the situation where the accused might have been convicted at an earlier trial of crime Y and crime Y is included in greater crime X, which is subsequently charged. In such a case the accused cannot be convicted again of the included crime. But can the accused nevertheless be convicted of the more serious crime, which includes the included crime? Jerome Atrens argues that, although the effect of this subsection is not clear, in such a case (e.g., where the

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12. See J. Atrens, "*Double Jeopardy*" in J. Atrens, P. Burns and J. Taylor, eds., *Criminal Procedure: Canadian Law and Practice*, vol. 2 (Toronto: Butterworths, 1981) XII-i at XII-76-XII-77.

13. *R.* v. *Mortimer*, [1953] O.W.N. 183 (C.A.).

14. *R.* v. *Rinnie* (1969), 9 C.R.N.S. 81 (Alta. C.A.).

accused was previously convicted of theft and is now, on the same incident, charged with robbery, which can include the crimes of assault and theft) the accused cannot be convicted of robbery but only of any remaining included crime for which the accused was earlier not in peril of conviction (namely assault, in the example given above).[15]

Under section 610, the *Code* sets out specific instances where a previous conviction or acquittal for some crimes bars a subsequent conviction for other crimes. Subsection 610(1) provides that where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or aggravating circumstances tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment. For example, a previous conviction for possession of illegal drugs would bar a subsequent prosecution on a charge of possession of drugs for the purpose of trafficking based on the same possession.[16] Subsection 610(2) provides that a conviction or an acquittal on an indictment for murder bars a subsequent indictment for the same homicide charging it as manslaughter or infanticide, and a conviction or acquittal on an indictment for manslaughter or infanticide bars a subsequent indictment for the same homicide charging it as murder. Subsection 610(3) provides that a conviction or an acquittal for first degree murder bars a subsequent indictment for the same homicide charging it as second degree murder, and a conviction or an acquittal on an indictment for second degree murder bars a subsequent indictment for the same homicide charging it as first degree murder. Subsection 610(4) provides that a conviction or acquittal on an indictment for infanticide bars a subsequent indictment for the same homicide charging it as manslaughter, and a conviction or acquittal on an indictment for manslaughter bars a subsequent indictment for the same homicide charging it as infanticide.

It is now clear that these special pleas apply both to summary conviction and indictable offences.[17]

Case law has held that the pleas of *autrefois acquit* and *convict* are available where the accused is charged with the same or substantially the same crime.[18] The most recent discussion of this matter is to be found in the Supreme Court of Canada decision in *R.* v. *Van Rassel*,[19] where the Court analyses the plea of *autrefois acquit* in terms of the identity of charges criteria set out in section 609. In *Van Rassel* the accused, an RCMP constable, had been acquitted in the United States of charges such as bribery

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15. *Supra*, note 12 at XII-77-XII-79.

16. *R.* v. *Hemmingway* (1971), 5 C.C.C. (2d) 127 (B.C. Co. Ct.).

17. See *Criminal Code*, s. 731, enacted by the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 175.

18. See, e.g., *R.* v. *King*, [1897] 1 Q.B. 214; *R.* v. *Barron*, [1914] 2 K.B. 570; *R.* v. *Sacco* (1926), 46 C.C.C. 243 (Ont. Co. Ct.); *R.* v. *McIntyre* (1913), 21 C.C.C. 216 (N.B. Co. Ct.); R. v. *Feeley,* [1963] 1 C.C.C. 254 (Ont. C.A.) at 265 *per* Schroeder, J.A.; *R.* v. *DeWolfe* (1986), 4 W.C.B. (2d) 68 (Ont. Dist. Ct.).

19. [1990] 1 S.C.R. 225.

arising out of his allegedly passing confidential information to a suspected drug dealer in the United States. He was later charged in Canada with breach of trust of his duties as a peace officer. The Court stated that to make out the defence of *autrefois acquit*, the accused must show that the charges laid against him are the same. In particular, the accused must prove the following:

> (1) the matter is the same, in whole or in part; and
> (2) the new count must be the same as in the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at that time to make the necessary amendments.[20]

Although neither the *Criminal Code* nor *Van Rassel* requires that the charges be absolutely identical (they need merely be the same "in part" or, to put matters another way, "substantially the same"), the substantive issue is: could the accused have been convicted at the first trial of the crime with which he is now charged? If the differences between the charges at the first and second trials are such that it must be concluded that the charges are different in nature, the plea of *autrefois acquit* is not available. On examining the U.S. and Canadian charges, the Court held that the charges were of a different nature: the Canadian charges dealt with events in Canada (the U.S. charges focused on events in that country), required no proof of monetary payment (the U.S. charges alleged acceptance of cash payments), and were based on a breach of trust by a Canadian official in relation to the people of Canada (the U.S. charges focused on damage to U.S. interests), and so the plea did not apply.

Recent Supreme Court cases have attempted to determine what constitutes a previous acquittal. Two guiding principles have emerged. First, the accused must have been placed in jeopardy (that is, in peril of conviction) at the earlier proceeding. In *R.* v. *Selhi*[21] the Court found no peril of conviction and no valid basis for the plea where a withdrawal of charges occurred at the very beginning of a trial before any evidence was adduced. Second, there must have been a final determination tantamount to an acquittal. Thus, in *R.* v. *Riddle*[22] the judge's dismissal of the case following his refusal to adjourn proceedings so that the prosecution could present its witnesses and following the Crown's refusal to call evidence, was sufficient to support an *autrefois acquit* plea on a later charge. In *Petersen* v. *The Queen*[23] it was held that a dismissal of the charge on the judge's mistaken belief that he no longer had jurisdiction to hear it supported a plea of *autrefois acquit*. In *R.* v. *Moore*[24] it was held that the erroneous quashing of defective counts on the ground that they disclosed no offence known to law supported the plea. What a final determination tantamount to an acquittal is depends not on the form of the order (e.g., a quashing, a dismissal or an acquittal) but rather on its

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20. Ibid. at 234.

21. [1990] 1 S.C.R. 277.

22. [1980] 1 S.C.R. 380.

23. [1982] 2 S.C.R. 493.

24. [1988] 1 S.C.R. 1097.

substance. A judicial stay of proceedings may thus give rise to a successful plea.[25] However, if the Crown stays proceedings no subsequent plea of *autrefois acquit* is available.[26] In this regard, it should be noted that the Commission proposes to clarify the law in this area by formulating more precise terminology that will make the meaning of the disposition of a case clearer. Specifically, the forthcoming Working Paper on *Remedies in Criminal Proceedings* will consider the concept of a "termination order" to replace the concepts of "dismissal," "permanent stay of proceedings" or any other final order that bars further proceedings against the accused with respect to the charge in issue.

It has been held that these special pleas cannot be raised at the preliminary inquiry stage on the ground that the justice's role at the preliminary inquiry is to determine whether there is sufficient evidence to commit for trial, not to accept pleas, which must be raised at trial.[27] Again, the Commission will be considering in a forthcoming Working Paper on *Trial within a Reasonable Time* whether such matters should be raised in pre-trial motions in order to promote efficiency and reduce delay.

### 2. Protection against Unreasonably Splitting a Case

Martin Friedland argues that the rule against unreasonably splitting a case "is undoubtedly the most important rule for the protection of the accused."[28] The primary reason for such a rule is that separate trials for crimes which could be conveniently tried at the same time are a powerful means by which to harass an accused and ensure eventual conviction for at least one crime. Yet the parameters of this protection against double jeopardy are still evolving.

In England, the House of Lords in *Connelly* v. *Director of Public Prosecutions*[29] held that, as a general rule, a judge should stay an indictment when satisfied that the charges are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form part of a series of crimes of the same or a similar character as the crimes charged in the previous indictment. The Court nevertheless noted that there are occasions on which special circumstances make it just and convenient for a second trial to proceed.[30] In *Connelly* the accused had been charged with murder and robbery arising out of the same factual situation. His conviction on the murder charge having been quashed, he was later tried for armed robbery. The House of Lords held that since the courts were only following the then current practice

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25. See *R.* v. *Moore*, ibid. at 1119, where Dickson C.J., albeit in a dissenting opinion, asserted *obiter* that a stay of proceedings on the basis of abuse of process in an entrapment case would support a plea of *autrefois acquit*.

26. *R.* v. *Tateham* (1982), 70 C.C.C. (2d) 565 (B.C. C.A.).

27. See, e.g., *R.* v. *Martin*, [1979] 4 W.W.R. 765 (Sask. Q.B.).

28. *Supra*, note 1 at 161.

29. [1964] 2 All E.R. 401.

30. Ibid. at 446-47 *per* Lord Devlin.

of trying murder charges separately from other counts, the subsequent trial did not constitute abuse of process in this case, although the Law Lords also decreed that such a practice should not be followed in future.

In contrast, at one time Canadian law permitted a prosecutor to exercise complete discretion whether to pursue separate trials. For example, in *R.* v. *Feeley*[31] the Ontario Court of Appeal held that the Crown was not bound to prosecute together two charges of conspiracy arising out of the same factual situation — i.e., conspiracy to commit an indictable offence and conspiracy to effect an unlawful purpose. However, recent case law indicates that the courts are adopting the rule against unreasonably splitting a case as an aspect of abuse of process along the lines set out in *Connelly*.

The leading case to date is *R.* v. *B.*,[32] a decision of the Ontario Court of Appeal. The accused had initially been charged with, tried and acquitted of sexual assault upon his daughter, with acquittal arising due to lack of proof beyond a reasonable doubt of non-consent. Just prior to taking the stand, the daughter informed the Crown of her decision to give evidence of sexual intercourse with her father: prior to that she had refused to talk to the Crown. Following the acquittal, the Crown laid a charge of incest against the father. The trial judge stayed the second proceedings on the ground of abuse of process. The Ontario Court of Appeal, invoking *Connelly*, laid down the following guidelines as to when splitting a case becomes an abuse of process.

While splitting a case does not per se amount to an abuse of process, it can amount to an abuse of process in three circumstances:

(a) where the second trial will force the accused to answer for the same delinquency twice;

(b) where the second trial will relitigate matters already decided on the merits, raising the spectre of inconsistent verdicts; or

(c) where the second trial is brought because of malice or spite so as to harass the accused and not for any proper purpose.[33]

The court ruled that this case came under none of these categories, and the trial was accordingly ordered to proceed.[34]

### 3. The Rule against Multiple Convictions

If a person is tried and convicted of one crime, when is it that he cannot be convicted of another crime? Modern Canadian law on the rule against multiple convictions was first developed by the Supreme Court of Canada in *Kienapple* v. *The*

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31. *Supra*, note 18, aff'd [1963] S.C.R. 539.

32. (1986) 29 C.C.C. (3d) 365.

33. Ibid. at 375.

34. At least one commentator has described this result as "disappointing". See D. Stuart, Annotation: *R.* v. *B.(K.R.)* (1986), 53 C.R. (3d) 216 at 217.

*Queen*.[35] In that case, the accused had been convicted at trial of the then crimes of rape and unlawful carnal knowledge of a female under 14 years of age. The Supreme Court of Canada, in a decision rendered by Laskin J., as he then was, ruled that a conviction on the latter charge could not stand, as being contrary to the rule against multiple convictions.

A more detailed examination of the crimes with which the accused was charged helps an understanding of the reasoning in the decision. The crime of rape required that the act of sexual intercourse be without consent. The crime of unlawful carnal knowledge was restricted to intercourse with a female under 14, whether with or without consent. There was overlap in the sense that the crime of rape embraced the other when the sexual intercourse took place with a female under 14 without her consent. The rationale of the decision was based upon the concept of *res judicata*. Laskin J. stated:

> The relevant inquiry so far as *res judicata* is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.[36]

And, further:

> If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions.[37]

The problem with the judgment was that it was ambiguous. To apply it, did one focus primarily on the fact that the crimes arose out of the same transaction or on the similarity of the elements of the crimes? Consequently, while a rule against multiple convictions was now clearly part of the criminal law of Canada, confusion reigned as to what precisely the rule was. As one commentator noted:

> The success of Canadian jurisprudence in formulating coherent parameters for the operation of *res judicata* has been less than impressive. Often, decisions involve mere statements of conclusions, inadequately related to any theory.[38]

The Supreme Court has considered the rule against multiple convictions in a variety of cases. In *Sheppe* v. *The Queen*[39] the Supreme Court narrowly interpreted the rule to hold that it generally did not apply to prevent conviction for both conspiracy to commit a crime and the completed crime itself. In *R*. v. *Hagenlocher*[40] the Manitoba

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35. [1975] 1 S.C.R. 729.

36. Ibid. at 750.

37. Ibid. at 751.

38. D.R. Klinck, "'The Same Cause or Matter': The Legacy of Kienapple" (1983-84), 26 *CLQ* 280 at 281. For other Canadian articles on this rule, see A.W. Mewett, "Nemo bis Vexari" (1973-74), 16 *CLQ* 382; J.C. Jordan, "Application and Limitations of the Rule Prohibiting Multiple Convictions: *Kienapple* v. *The Queen* to *R*. v. *Prince*" (1985), 14 *Man. L.J.* 341; A.F. Sheppard, "Criminal Law — Rule Against Multiple Convictions" (1976), 54 *Can. Bar Rev.* 627; K.L. Chasse, "A New Meaning for Res Judicata and its Potential Effect on Plea Bargaining" Parts I, II, and III (1974), 26 *CRNS* 20, 48, 64; E.G. Ewaschuk, "The Rule Against Multiple Convictions and Abuse of Process" (1975), 28 *CRNS* 28.

39. [1980] 2 S.C.R. 22.

40. (1981) 65 C.C.C. (2d) 101, appeal dismissed [1982] 1 S.C.R. viii.

Court of Appeal applied a liberal interpretation of the rule to prevent a conviction for unlawfully setting a fire where the accused had already been convicted of manslaughter for the death of a man asphyxiated by the smoke from the fire, and the Supreme Court dismissed the appeal from that decision. In *Krug* v. *The Queen* the Supreme Court held that a conviction for attempted robbery described as attempted theft while armed with an offensive weapon did not preclude a conviction for using a firearm while attempting to commit an indictable offence.[41] However, until recently the Court's decisions were sufficiently ambiguous to give rise to conflicting interpretations about the rule.

This inconsistency in interpretation has to a large extent been clarified by the recent Supreme Court of Canada decision in *R.* v. *Prince*.[42] The accused had stabbed D, a pregnant woman, in the abdomen. A few days later D gave birth to a child who lived for only a few moments. Charged with attempted murder of D, the accused was acquitted of that charge but convicted of causing bodily harm to D. Later the accused was charged with the crime of manslaughter of the child. The trial judge refused to stay the subsequent prosecution on the manslaughter charge. The Manitoba Court of Appeal held that *Kienapple* applied and quashed the indictment. The Supreme Court of Canada, however, held that the *Kienapple* principle did not apply.

In the judgment of the court, for *Kienapple* to apply there has to be (a) a factual nexus between the charges (i.e., the same act of the accused must ground each charge) and (b) an adequate "legal" nexus between the charges. In pointing out what an adequate "legal" nexus is, Dickson C.J. argued that *Kienapple* applied only where "there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle."[43] He added that there were at least three ways in which the elements of one crime could be said to be not additional to or distinct from another. First, where the element of one crime may be a particular instance of the other (e.g., the crime of pointing a firearm is a particular instance of the crime of using a firearm). Second, where there is more than one method, in more than one crime, of proving a single delict (e.g., the crime of giving evidence in a judicial proceeding contrary to previous evidence so given, and the crime of perjury — both involve the delict of giving false evidence). Third, where Parliament deems a particular element of one crime to be satisfied by proof of a different nature because of social policy or the inherent difficulties of proof (e.g., the crime of driving while impaired and the crime of driving with a blood-alcohol concentration over .08).[44]

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41. [1985] 2 S.C.R. 255.

42. [1986] 2 S.C.R. 480.

43. Ibid. at 498-99. Dickson C.J. also pointed out a corollary to this conclusion. Where the crimes are of unequal gravity, *Kienapple* may bar a conviction for a lesser crime notwithstanding that there are additional elements in the greater crime for which a conviction has been registered, provided that there are no additional elements in the lesser crime.

44. Ibid. at 499-502.

Applying these rules to *Prince*, the Supreme Court held that the *Kienapple* principle did not apply. While a factual nexus existed (the same act grounded both charges), there was no sufficient correspondence between the elements of the crimes of causing bodily harm to D and of the manslaughter of D's child. Moreover, *Kienapple* clearly did not apply where the crimes resulted in injury or death to different persons.[45]

Subsequent Supreme Court decisions show the narrow ambit of the rule against multiple convictions as interpreted in light of *Prince*. In *R.* v. *Wigman*[46] the Supreme Court held that a plea of guilty to breaking and entering did not preclude an accused from being tried again for attempted murder arising out of the same circumstances. As the court stated:

> In the case at bar, the offence of attempted murder involved the appellant striking Mrs. Hill with intent to kill or, at that time, with intent to cause bodily harm, knowing it to be likely to cause death and being reckless whether death ensued or not. The elements of the offence of breaking and entering and committing robbery involved breaking and entering the apartment, taking jewellery and money, and using violence. There is no overlapping of the essential elements of the two offences, the only common element is violence, and the required specific intents are clearly different. The *Kienapple* principle does not apply and the appellant must fail on this point.[47]

Similarly, *R.* v. *Wigglesworth*[48] illustrates the narrow scope of the rule. The accused, an RCMP constable, had slapped a suspect in custody. The accused had been found guilty before an RCMP service court of the major service offence under the *Royal Canadian Mounted Police Act* of being cruel, harsh or unnecessarily violent to a person. He was later charged with the crime of assault in provincial criminal court. A majority of the Supreme Court justices held that the rule against multiple convictions did not apply, on the ground that the major service offence was a disciplinary matter whereas the crime of assault was a penal matter. Estey J. dissented on this issue, applying what is arguably a more detailed analysis of *Prince* to the circumstances of the case. There are also *dicta* to the effect that Parliament may depart from the rule against multiple convictions by express statutory language, by providing, for example, that a sentence for the crime of using a firearm shall be served consecutively to any other punishment imposed for a crime arising out of the same event.[49]

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45. Or where different victims are involved even though no bodily injury has occurred. See *R.* v. *Van Rassel*, *supra*, note 19.

46. [1987] 1 S.C.R. 246.

47. Ibid. at 256-57.

48. [1987] 2 S.C.R. 541.

49. See, e.g., *McGuigan* v. *The Queen*, [1982] 1 S.C.R. 284; *R.* v. *Prince*, *supra*, note 42. It should be noted, however, that the courts will refuse to find a parliamentary intention to override the rule against multiple convictions where the principle offence itself requires as a necessary ingredient the other offence. See, e.g., *Krug* v. *The Queen*, *supra*, note 41. (The rule against multiple convictions precludes convictions for both using a firearm and pointing a firearm.)

4. Protection against Inconsistent Judgments (Issue Estoppel)

Another important aspect of *res judicata* is the concept of protection against inconsistent judgments. Known in Canada and England as "issue estoppel" and in the United States as "collateral estoppel," it means simply, as Brennan J. stated in *Ashe* v. *Swenson*,[50] "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[51]

"Issue estoppel" was authoritatively recognized as part of Canadian criminal law by the Supreme Court of Canada in *Gushue* v. *The Queen*,[52] but the application of the doctrine remains problematic. The following examples provide an overview of the decisions of the Supreme Court in this area.

1. In *Gushue*, G was acquitted of a charge of murder allegedly committed during a robbery, on the basis of his testimony that he was not present when the murder took place. G later confessed to killing and robbing the deceased. At a preliminary inquiry on the robbery charge, he admitted killing the deceased. G appealed convictions on charges of robbery and giving contradictory evidence to the Supreme Court of Canada on the ground that the earlier judgment in the murder trial had concluded that he took no part in the robbery. The Supreme Court of Canada held that issue estoppel did not apply to the charge of robbery because the finding on the earlier murder trial that G did not kill the deceased did not necessarily mean that G was not a party to the robbery. Also, issue estoppel did not apply to the charge of giving contradictory evidence. Issue estoppel cannot be based on false evidence where evidence of the falsity is not available at the trial from which issue estoppel is alleged to arise.
2. In *Grdic*,[53] G, charged with driving offences, was acquitted because of his testimony that he was stopped at a time earlier than that given by the arresting officer, thereby throwing the certificate of analysis of the breath samples into doubt. Later G was charged with perjury. G argued that issue estoppel applied to bar the subsequent perjury prosecution because the earlier court had in effect found that he had not been driving a car at the time claimed and that this prevented a perjury conviction based on the finding not being true. While arguing that issue estoppel cannot apply where the issue was determined in favour of the accused because of fraud, the Supreme Court of Canada held that there were two limitations to this rule: (a) where the Crown is merely tendering the same evidence as that tendered previously; or (b) if additional evidence is tendered that would have been available to the Crown at the time of the first trial by the Crown's using reasonable diligence. Because the new evidence of

50. 397 U.S. 436 (1970).

51. Ibid. at 443.

52. [1980] 1 S.C.R. 798. For a discussion of issue estoppel in light of the *Gushue* decision, see K.L. Chasse, "A Note on Issue Estoppel" (1980), 16 C.R. (3d) 357.

53. *Grdic* v. *The Queen*, [1985] 1 S.C.R. 810.

perjury (i.e., the evidence of witnesses) was available at the time of the first trial, the claim of issue estoppel was not defeated. However, in dissent, a minority of Supreme Court Justices (including Dickson C.J.) argued in part that no reasonable diligence requirement was needed because that requirement was designed to protect against double jeopardy. Here the accused was not faced with the increased prejudice of being tried twice for two crimes and being convicted both times. He was only in jeopardy of one conviction.

3. In *Duhamel*,[54] D was tried on one count of robbery. At trial, statements incriminating the accused were ruled inadmissible on *voir dire*. D was acquitted. On a subsequent charge of robbery, the same statements were ruled admissible. The Supreme Court of Canada ruled that issue estoppel did not apply to interlocutory findings.

Other parameters have also been laid down. It has been held that issue estoppel does not apply where the parties in a subsequent prosecution are different from those of an earlier prosecution (e.g., where there has been a ruling by a court other than the Supreme Court of Canada that a video is not obscene and a different distributor is subsequently charged with circulating the same material).[55] Nor is it available to the Crown in criminal matters.[56] This is because issue estoppel is regarded as a matter of *defence* and, as with all defences in criminal law, its benefits accrue solely to the accused.[57]

## 5. Miscellaneous *Criminal Code* Provisions

Section 12 of the *Code* provides that where an act or omission is an offence under more than one Act of Parliament, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

Specific protection against double jeopardy is offered in the context of investigative tests to prove drunk driving. At present the *Code* gives a peace officer the power, on reasonable suspicion that a person operating a motor vehicle, etc., has alcohol in his body, to demand that the person provide a breath sample for a screening test and, where necessary, to demand that the person accompany the officer for the purpose of

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54. *Duhamel* v. *The Queen*, [1984] 2 S.C.R. 555.

55. *R.* v. *Nicols* (1984), 43 C.R. (3d) 54 (Ont. Co. Ct).

56. See, e.g., *R.* v. *Sunila (No. 3)* (1986), 73 N.S.R. (2d) 315 (S.C.T.D.); *R.* v. *Bailey* (1982), 8 W.C.B. 208 (Ont. Co. Ct.).

57. Atrens, *supra*, note 12 at XII-90 states:

> To hold that the accused is estopped from denying issues previously determined in favour of the Crown by a conviction for a different offence would violate s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.... The presumption [of innocence] must surely apply to all the issues raised by the offence presently charged, and not merely to the issues not decided by the previous conviction.

enabling the sample to be taken. In addition, the peace officer has a similar power, on a reasonable belief that the person is committing a drunk driving crime, to demand that the person provide breath samples for a breathalyzer test or to provide blood samples and so to accompany the officer. Failure or refusal to provide the sample or samples is a crime.[58] Case law had determined that a person could be convicted both of refusal to comply with a demand for a breath sample for a roadside screening test and of refusal to provide samples for a breathalyzer test or to provide blood samples.[59] Parliament acted to change the undue harshness of such an interpretation of the law. Subsection 254(6) provides, in relation to the crime of failure or refusal to provide a breath or blood sample, that where a person is convicted of that crime he shall not be convicted of another crime of failure or refusal to provide such a sample in respect of the same transaction.

The *Code* also offers specific protection against double jeopardy in the context of an attempt to commit a crime. Subsection 661(2) provides that where an accused is charged and convicted of an attempt to commit a crime, the accused cannot later be tried for committing the complete crime.

There are also *Code* provisions that offer double jeopardy protection where an accused has been previously acquitted or convicted in another country. These are more fully explained in the brief section on the effect of foreign acquittals and convictions.

## 6. Constitutional Protection against Double Jeopardy

There are two *Charter* provisions that may be invoked to protect against double jeopardy — one that is general in scope and one that specifically addresses double jeopardy matters. The general provision is section 7 of the *Charter*, which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The specific provision is subsection 11(*h*) of the *Charter*, which provides that "[a]ny person charged with an offence has the right, if finally acquitted of the offence, not to be tried for it again and, if finally found guilty or punished for the offence, not to be tried or punished for it again".

The extent to which section 7 will protect against double jeopardy has still to be decided by the courts. However, it is clear from the Supreme Court's decision in *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*[60] that section 7 must be given a broad interpretation so as to ensure both procedural and substantive justice. (In that case, the Supreme Court ruled that the creation of an absolute liability offence that could result in imprisonment offended section 7 of the *Charter*.) Thus, it is not surprising that section 7 is often raised as a complement to

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58. See *Criminal Code*, subsec. 254(2), (3), (5).

59. *R.* v. *Wilmer* (1981), 23 C.R. (3d) 275 (Alta. C.A.).

60. [1985] 2 S.C.R. 486.

subsection 11(*h*) when *Charter* arguments on protection against double jeopardy are raised.[61]

The extent to which subsection 11(*h*) protects against double jeopardy has yet to be fully resolved by the courts. On a literal interpretation this provision is quite narrow in that it does not readily include the rule against multiple convictions, the rule against reasonably splitting a case, issue estoppel, and so on.[62] Nonetheless, this provision has been interpreted more liberally so as to provide greater protection against double jeopardy than a literal reading would indicate. For example, in recent cases the Supreme Court of Canada has, to assist in interpreting this provision, referred to its analysis of the rule against multiple convictions as set out in *Prince*.[63]

*Charter* cases involving subsection 11(*h*) have considered a number of issues. Two of these are: (a) does it offer protection in extradition hearings?; and (b) does the phrase "found guilty and punished for [an] offence" cover such proceedings as police disciplinary hearings under police acts or internal disciplinary proceedings within prisons?

The first issue, concerning extradition hearings, has now been resolved by *Canada* v. *Schmidt*.[64] The accused had been charged with child stealing under Ohio state law after being charged with and acquitted of kidnapping under U.S. federal law. The majority of the Court argued that this *Charter* protection had no application at all in extradition hearings, on the ground that extradition hearings are not trials. (In concurring opinions, however, two justices, while agreeing with the result, argued that this section would apply in an appropriate case.)

The second matter has recently been resolved by the Supreme Court in *R.* v. *Wigglesworth* and *R.* v. *Shubley*.[65] The Court set out in *Wigglesworth* a two-pronged test for determining if conduct giving rise to proceedings fell within the meaning of the term "offence" as used in subsection 11(*h*): (a) are the proceedings by their very nature criminal proceedings? and (b) if not, does the punishment invoked involve the imposition of true penal consequences? A true penal consequence was defined as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline within a limited sphere of activity.

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61. See, e.g., *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500; *Century 21 Ramos Realty Inc.* v. *R.* (1987), 56 C.R. (3d) 150 (Ont. C.A.).

62. For a criticism of the narrow wording of this subsection, see M.L. Friedland, "Legal Rights Under the Charter" (1981-82), 24 *CLQ* 430 at 448-49.

63. See, e.g., *Canada* v. *Schmidt*, *supra*, note 61 *per* Wilson J. dissenting at 533-34; *R.* v. *Wigglesworth*, *supra*, note 48 *per* Wilson J. at 564-66.

64. *Supra*, note 61.

65. *R.* v. *Wigglesworth*, *supra*, note 48; *R.* v. *Shubley*, [1990] 1 S.C.R. 3. It should also be noted that the Court held that s. 11(*h*) did not apply in *R.* v. *Van Rassel*, *supra*, note 19.

In *Wigglesworth* the Supreme Court held, in a majority judgment written by Wilson J., that an RCMP officer who had been convicted of a "major service offence" under the *Royal Canadian Mounted Police Act* because of his assault on an accused could later be prosecuted for assault under the *Criminal Code*. The Court agreed that the "major service offence" was an "offence" for the purposes of subsection 11(*h*). However, in a curious twist of reasoning, the Court held that this *Charter* guarantee did not apply because the disciplinary offence was not criminal or penal in nature. In *Shubley* the majority of the Court held that an informal prison disciplinary hearing following an assault by a prisoner that resulted in the prisoner's being placed in solitary confinement for a few days with a restricted diet did not preclude a criminal trial for assault. The Court reasoned that the proceeding was not criminal in nature (so that the first test in *Wigglesworth* did not apply) and that the punishment given in this case did not involve the imposition of true penal consequences (so that the second test did not apply).

## C. Other Matters Affecting Double Jeopardy

### 1. Effect of Foreign Convictions and Acquittals

In English law a previous foreign conviction or acquittal for the same or substantially the same crime will result in a successful plea of *autrefois acquit* or *convict*. However, certain conditions must be met. First, the Court must be one of competent jurisdiction. Second, the fact of acquittal or conviction by a foreign court is not enough: the accused must truly have been in jeopardy. Thus, where a person is convicted in absentia in one jurisdiction but is unlikely ever to return to it to be subjected to the punishment imposed there, he cannot plead *autrefois acquit* or *convict* in another jurisdiction because he was never truly in jeopardy.[66]

As noted earlier, the present *Code* contains provisions dealing with the effect of foreign acquittals and convictions on a subsequent trial for the same crime in Canada. First, subsection 465(7) offers the protection of the special pleas in the context of conspiracies triable both in Canada and in a foreign jurisdiction where the person has been previously acquitted, convicted or pardoned abroad. Second, for crimes committed outside Canada that are deemed to be committed in Canada under section 7 of the *Code* (e.g., hijacking an airplane and war crimes), subsection 7(6) provides that if the person has been tried and dealt with outside Canada in respect of the offence in such a manner that if he had been tried and dealt with in Canada he would be able to plead *autrefois acquit*, *autrefois convict*, or pardon, he shall be deemed to have been so tried and dealt with in Canada. However, a recent amendment to the *Code*, subsection 607(6), provides that for most of these crimes the person may not plead *autrefois convict* to the charge in Canada if at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and the person was not punished in accordance with the sentence imposed upon conviction in respect of the act or omission.

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66. *R.* v. *Thomas*, [1984] 3 All E.R. 34 (C.A.).

The *Code* contains no provision concerning the use of the doctrine of *res judicata* (i.e., the rule against multiple convictions) to bar a subsequent prosecution in Canada. However, the case of *R.* v. *Leskiw*,[67] a decision of the Ontario District Court, is authority that the defence of *res judicata* is available to persons convicted or acquitted of other crimes in other countries.

The Supreme Court of Canada, in *R.* v. *Van Rassel*,[68] recently had occasion to determine if the concept of double jeopardy applied between nations — a concept including *autrefois acquit*, the rule against multiple convictions, issue estoppel, and subsection 11(*h*) of the *Charter*. However, the Court did not directly answer this issue, holding instead that applying the principles of double jeopardy in that case would not have barred proceedings in Canada. Nonetheless, given the weight of common law and statutory authority in favour of applying double jeopardy principles between nations, it is a reasonable assumption that in an appropriate case the Court would bar proceedings where a foreign court has already ruled on the issue.

A major issue that arises is the extent to which the court in the prosecuting country will recognize the jurisdiction of the other country to have previously convicted or acquitted the accused. Generally, there are five principles on which penal jurisdiction is claimed by states: (a) the territorial principle (the territory in which the crime is committed); (b) the nationality principle (the nationality of the accused); (c) the protective principle (the national interest injured by the crime); (d) the universality principle (whoever has custody of the person who committed the crime); and (e) the passive personality principle (the nationality of the person victimized by the crime). Which rule of jurisdiction should the prosecuting court recognize? Martin Friedland argues, by reference to English law, that: (a) a judgment by a foreign court for a crime committed abroad will be recognized as barring a second proceeding for the same crime in a domestic court if the foreign court took jurisdiction on a basis recognized by that domestic court or international law; and (b) where the crime is wholly committed in one country, a special plea will succeed after a foreign trial in another country for that crime only if the country in which the crime was committed has waived its primary right to try the accused.[69]

Another issue is the extent to which the crimes must be similar. The crimes will rarely be defined in the same way. Martin Friedland argues that the less the national interest involved, the more likely the court would be to equate the crimes. For example, a court would be more willing to recognize an acquittal or conviction for murder or manslaughter abroad, but not a foreign decision on the crime of treason.[70]

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67. (1986) 26 C.C.C. (3d) 166. See also *R.* v. *Frisbee*, [1989] B.C.D. Crim. Conv. 5940-02.

68. *Supra*, note 19.

69. *Supra*, note 1 at 370-83.

70. Ibid. at 383-87.

## 2. Effect of the Federal-Provincial Division of Powers

In a federal system, where both the federal and state governments exercise criminal law powers, an obvious problem arises: does the protection against double jeopardy apply where a person convicted or acquitted of a federal crime is subsequently prosecuted for the same criminal act as a state crime? In the United States, a person can be prosecuted for both a federal and a state crime that are substantially the same unless state legislation bars such dual prosecution. The reasoning is that the federal and state governments are two sovereignties, each having the power to protect the peace and security of persons within its jurisdiction.[71] In Canada the power to legislate against criminal activity falls exclusively under the authority of the federal government, although provinces can create provincial offences in relation to matters falling under provincial jurisdiction. What happens in case of overlap? The 1942 case of *R.* v. *Kissick*[72] adopted the same approach as in the United States. In *Kissick* the Manitoba Court of Appeal refused to apply the plea of *autrefois acquit* to an accused who, previously acquitted of a charge of unlawful possession of liquor under the federal *Excise Act*, was subsequently prosecuted and convicted for a charge of unlawful possession of liquor under the provincial *Liquor Control Act*. Nonetheless, in light of *Kienapple* recent authorities indicate that double jeopardy principles can be applied where the accused faces both a conviction for a *Code* crime and for a quasi-criminal provincial offence.[73]

# D. Procedural Matters

## 1. Double Jeopardy Issues Cannot be Raised at the Preliminary Inquiry

The courts are loath to consider many double jeopardy issues prior to trial. As noted earlier, the plea of *autrefois acquit* or *convict* is not allowed to be raised at the preliminary inquiry stage (on the ground that a preliminary inquiry is not a trial but merely a procedure to determine if there is sufficient evidence to put the accused on trial).[74] The same prohibition applies to raising the rule against multiple convictions and to issue estoppel.[75] As noted above, for similar policy reasons double jeopardy issues cannot be raised at an extradition hearing.[76]

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71. See *United States* v. *Lanza*, 260 U.S. 377 (1922); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959).

72. (1942) 78 C.C.C. 34.

73. See *R.* v. *Jervis* (1988), 94 A.R. 67 (Prov. Ct.); *R.* v. *Hersey* (1989), 91 N.S.R. (2d) 260 (Co. Ct.); *Procureur général du Québec* v. *Tremblay*, [1980] C.A. 346 at 349 (*obiter*); *R.* v. *Kehoe* (1974), 21 C.C.C. (2d) 544 (Ont. Prov. Ct.) (*obiter*); *R.* v. *Landman* (1984), 13 W.C.B. 181 (B.C. Prov. Ct.); Sheppard, *supra*, note 38 at 651; Atrens, "Double Jeopardy", *supra*, note 12 at XII-131. *Contra*, *R.* v. *Anthony* (1982), 52 N.S.R. (2d) 456 (S.C.A.D.) (*obiter*).

74. See, e.g., *Re Regina* v. *Rothman*, [1966] 4 C.C.C. 316 (Ont. H.C.); *Re Schmidt and The Queen* (1984), 44 O.R. (2d) 777 (Ont. C.A.) at 781-82.

75. *Re Schmidt and The Queen*, *supra*, note 74 at 783.

76. *Canada* v. *Schmidt*, *supra*, note 61.

2. Effect on Pleas and Verdicts When Rule against Multiple Convictions Applies

How does the rule against multiple convictions affect verdicts and pleas? In *R.* v. *Loyer*, Laskin C.J. argued for the following rule:

> Where a trial before a judge alone or before a judge and jury proceeds on two or more counts of offences of different degrees of gravity, and the same delict or matter underlies the offences in two of the counts, so as to invite application of the rule against multiple convictions, the trial judge should direct himself or direct the jury that if he or they find the accused guilty on the more serious charge, there should be an acquittal on the less serious one; but if he or they should acquit on the more serious charge, the question of culpability on the less serious charge should be pursued and a verdict rendered on the merits.
>
> Again, if at the trial, there is a plea of guilty to the more serious charge, and a conviction is registered, an acquittal should be entered or directed on the less serious, alternative charge. However, if, as was the case here, the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending the trial on the more serious offence. If there is a finding of guilty on that charge, and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal directed.[77]

The rule therefore applies to two situations in which the rule against multiple convictions may be invoked: (a) where there are two or more charges to which the accused has pleaded not guilty and the court is deciding what verdicts to enter on the charges; and (b) where the accused wishes to plead guilty to a lesser charge. In the latter situation, the accused cannot escape conviction on a greater charge by pleading guilty to a lesser charge, thereby obligating the court to automatically accept that plea.

However, the rule set out in *Loyer* created a major problem: what happens if the accused is convicted of the more serious charge and acquitted of the lesser charge at trial but, on appeal, the conviction on the more serious charge is overturned? Can the accused, despite evidence of guilt of the lesser crime at trial, then argue that no conviction can be registered for the lesser crime because he has been acquitted of it? The Quebec Court of Appeal, in the earlier case of *Davidson* v. *The Queen*,[78] reluctantly concluded that the accused is protected from conviction on the lesser charge when *Loyer* is strictly followed. However, other courts of appeal refused to follow this approach, and instead moved away from a strict interpretation of the rule in *Loyer* to permit a conviction on the lesser charge. The Supreme Court of Canada, in *R.* v. *Provo*,[79] has now clearly adopted a rule that favours the latter approach.

The rule is that, instead of entering an acquittal on the lesser charge when a conviction is entered on the greater charge, the court should enter a conditional stay on the lesser charge. The stay is conditional on the final disposition of the charge on which the accused has been convicted. If the appeal of the accused from the conviction arising from the same delict is eventually dismissed, or if the accused does not appeal

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77. [1978] 2 S.C.R. 631 at 635.

78. (1986) 51 C.R. (3d) 43.

79. [1989] 2 S.C.R. 3.

within the specified time limits, then the conditional stay becomes a permanent stay tantamount to a judgment or verdict of acquittal for the purpose of an appeal or a plea of *autrefois acquit*. However, if the appeal of the accused from the conviction is successful, the conditional stay dissolves and the appellate court, while allowing the appeal, should make an order remitting to the trial judge the count or counts that were conditionally stayed because of the application of the rule against multiple convictions, notwithstanding that no appeal was taken from the conditionally stayed counts. The trial judge would then enter a conviction on the lesser charge and impose sentence in relation to it. Wilson J. explained the rationale for this refinement:

> [T]he use of a conditional stay of proceedings as opposed to an acquittal more accurately reflects the policy reasons which preclude the registering of a conviction. The accused who would be guilty of an offence except for the application of the rule against multiple convictions is not, in my view, deserving of an acquittal in the true sense that the state had not met its burden of proving the elements of the offence. If, as is the case here, the trial court pursues the preferable and safe course of making findings on all the counts charged, it will be clear that all the elements of the offence have been proved against the accused even if the registering of a conviction is barred for the policy reasons underlying the *Kienapple* principle. The policy considerations here are analogous to those which apply when proceedings against an accused are stayed because of entrapment. They are concerned with the integrity and fairness of the administration of justice rather than with the culpability of the accused.[80]

This raises two other issues: when should the applicability of the rule against multiple convictions be raised, and how should it be reviewed? The preferred view of the Supreme Court is that, at least when the charges are being tried together, the trial judge should hear the evidence on the charges before applying the rule against multiple convictions so as to preclude entering a conviction on the lesser charge. By this means, if a conviction on the more serious charge is overturned on appeal, a conviction on the lesser charge may quickly be entered because it has already been determined that the accused is guilty of the charge.[81] The judge's decision whether or not to apply the rule against multiple convictions would be reviewed by using the appeal mechanism. Where the charges are tried separately, the procedure is more complex: the case of *R.* v. *Prince* illustrates this complexity. The accused had first been charged and tried for attempted murder of a woman, which resulted in a conviction of assault causing bodily harm. However, the accused was also separately charged with manslaughter of the child who was born soon after the attack on the mother and died minutes later. The preliminary inquiry on the charge of manslaughter resulted in the accused being committed for trial. Defence counsel then made a preliminary motion before the trial judge to have proceedings stayed on the ground that the *Kienapple* rule applied. The trial judge denied the motion. Defence counsel then applied for a prerogative remedy from the superior court in an attempt to have the superior court decide the issue of whether or not *Kienapple* applied. The Manitoba Court of Appeal agreed that the prerogative remedy was available to the accused, arguing that otherwise the accused would have to go to trial and, if convicted, raise the issue of multiple convictions on the appeal from the convictions. This was seen by the Court of Appeal as causing

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80. Ibid. at 17.

81. Ibid. at 17-18.

delay by requiring the accused to undergo an unnecessary trial. On the appeal to the Supreme Court of Canada, Dickson C.J. did not object to the issue being raised before the trial judge by way of preliminary motion. However, he argued strongly that it was inappropriate for a superior court to grant a prerogative remedy on an interlocutory application in respect of the rule against multiple convictions, on the ground that this procedure created delay by preventing the trial on the charges from taking place.[82]

## II. Pleas

### A. Introduction

The special pleas discussed above protect against double jeopardy. However, where an accused is charged with a crime and there is no double jeopardy issue to be raised, there must clearly be a procedure by means of which the accused formally responds to the charge against him and, where the accused so desires, contests it or puts it in issue before the court. This process is known as pleading.

### B. General Matters

#### 1. Permitted Pleas

##### (*a*) *The Pleas of Guilty and Not Guilty*

The pleas permitted by the *Code* are set out in subsection 606(1). It provides that an accused who is called upon to plead may plead guilty or not guilty, or the special pleas authorized by Part XX, and no others. (These special pleas, with one exception, are the special pleas in bar of proceedings — e.g., *autrefois acquit* and *convict*, already examined under protection against double jeopardy. The one exception is the special plea of justification to the crime of defamatory libel.)

The plea of not guilty is the formal denial by the accused that he committed the crime charged. Once this plea is entered, the Crown is required at trial to prove beyond a reasonable doubt that the accused committed the crime.

In contrast, an accused who pleads guilty admits having committed the crime charged, and consents to a conviction being entered without any trial. This plea relieves the Crown of the burden of proving guilt beyond a reasonable doubt. By pleading guilty, the accused abandons any rights that would have been available had a trial been held, such as the right to make full answer and defence to the charge.[83]

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82. *R.* v. *Prince*, *supra*, note 42 at 507-08.

83. See *Adgey* v. *The Queen*, [1975] 2 S.C.R. 426 at 439, where Laskin J., albeit in a dissenting judgment, discusses the various rights given up by an accused upon pleading guilty.

Why does our criminal justice system permit the entering of pleas of not guilty or guilty? The necessity for a "not guilty" plea is obvious. By so pleading, an accused denies the accusation of criminal conduct and makes a trial necessary. Indeed, our criminal justice system strives to give full effect to a plea of not guilty — hence such doctrines as proof beyond a reasonable doubt and presumption of innocence. But why is it that a plea of guilty is permitted to be entered? Why not require in every case that a person be required to plead not guilty and that the Crown then be required to prove guilt?

The American Bar Association has outlined why the plea of guilty is a useful part of the criminal justice system:

> The plea provides a means by which the defendant may acknowledge guilt and manifest a willingness to assume responsibility for his or her conduct. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Also, pleas make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders....
>
> Conviction on a plea of guilty ... is not merely a manner of administrative convenience. Even if more prosecutors, judges, and defense counsel were available and trial of all cases were possible, conviction without trial would continue to be a necessary and proper part of the administration of criminal justice. Indeed, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence. The frequency of conviction without trial, therefore, not only permits the achievement of legitimate objectives in cases where pleas of guilty ... are entered, but also enhances the quality of justice in other cases as well.[84]

### *(b) The Special Plea of Justification for the Crime of Defamatory Libel*

The present provisions governing the crime of defamatory libel in the *Code* provide, as one of the defences, that the libel was true and that it was published for the public benefit.[85] However, unlike other *Code* defences, this defence of justification must be specially pleaded. Section 611 sets out the elements of this special plea: it must be made in writing and must set out the particular facts by reason of which it is alleged to have been for the public good that the matter should have been published. Moreover, the plea may justify the defamatory matter in any sense specified in the count or in the sense that the defamatory matter bears without being specified. The prosecutor may in his reply generally deny the truth of this plea. Under section 612, if no such plea of justification is made, the truth of the defamatory matter cannot be inquired into unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may be given to negative the allegation that the accused knew that the libel was false. The accused may, in addition to a plea that

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84. American Bar Association, *Standards for Criminal Justice*, 2d ed., vol. 3 (Boston: Little, Brown and Company, 1980) 1982 Supp. at 14.4-14.5.

85. *Criminal Code*, ss. 297-317, especially s. 311.

is made under section 611, plead not guilty and the pleas shall be inquired into together. Also, if the plea of justification is pleaded and the accused is convicted, the court may, in pronouncing sentence, consider whether the guilt of the accused is aggravated or mitigated by the plea.

## 2. Impermissible Pleas

### *(a) Conditional Plea of Guilty*

Because a guilty plea constitutes an admission of all the essential elements of a crime, the law rejects conditional pleas of guilty. For example, the Ontario Court of Appeal specifically rejected conditional pleas in *R.* v. *Lucas*.[86] At trial on a charge of murder, the accused entered a plea of not guilty but also, with consent of counsel, a conditional plea of guilty to manslaughter, conditional in the sense that the defence wished to raise the issue of causation. The Court held that this kind of plea was not permitted by section 534 [now s. 606] of the *Code*, that the entire proceedings were a nullity, and that a new trial had to be ordered. It stated:

> A conditional plea of guilty is unknown to our law. The pleas open to an accused under s. 534(1) [now s. 606(1)] are guilty, not guilty and the special pleas, and not others. The wisdom of that rule is exemplified by the confusion that arose here, where it is still uncertain and in dispute, what, if anything, it was that the appellant admitted or intended to admit.[87]

Similarly, it appears that a plea of guilty with an explanation is permitted only if the plea is not equivocal as to guilt. For example, in *R.* v. *McNabb*[88] the Saskatchewan Court of Appeal reiterated that an accused is not to be taken to admit a charge unless he pleads guilty in unambiguous terms. Faced with a plea of "guilty with an explanation," the Court ruled that:

> The responsibility rests with the Court to see that there is no qualification or condition on the accused's part in giving a guilty plea. When a qualified or conditional plea is given, the same should not be accepted as a plea of guilty unless the Court is satisfied, after due inquiry, that the qualification or condition does not derogate from the accused's intention to enter an unequivocal plea of guilty.[89]

The Court permitted the accused to withdraw his plea of guilty with an explanation on the ground that the judge did not make the inquiry necessary to determine the intention of the accused to enter an unequivocal plea of guilty.

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86. (1983) 9 C.C.C. (3d) 71, leave to appeal to the Supreme Court of Canada refused [1984] 1 S.C.R. x. See also *R.* v. *Durocher*, [1964] 1 C.C.C. 17 (B.C.C.A.); A.E. Popple, "Accepting a Plea of Guilty" (1946), 1 C.R. 183.

87. *R.* v. *Lucas, supra*, note 86 at 75.

88. (1971) 4 C.C.C. (2d) 316.

89. Ibid. at 319.

*(b) Other Common Law Pleas*

As noted, the pleas now available in Canadian law are those of guilty, not guilty, and the special pleas set out in the *Code*. However, at English common law there existed other kinds of pleas available to the accused if he did not plead guilty: (a) a plea to the jurisdiction; (b) a demurrer to the indictment; and (c) a plea in abatement.

A plea to the jurisdiction was made where an indictment was taken before a court that had no cognizance of the crime.[90]

A demurrer was a plea made when the fact alleged was conceded to be true, but the accused took issue with some point of law in the indictment, by which he insisted that the facts conceded did not in law amount to the crime alleged.[91]

A plea in abatement was principally for a misnomer, such as a wrong name put in the indictment, which, if proved to the satisfaction of the jury, would result in the indictment being abated.[92] The abatement of an action signified its death.

*(c) Plea of* Nolo Contendere

Canadian evidence law allows a plea of guilty to a criminal charge to be admissible in evidence in a civil proceeding to help prove the allegations made at the civil proceeding. For example, a plea of guilty to a charge of assault is admissible in evidence as proof of the assault in a civil proceeding for the same assault.[93] However, the plea of guilty is not conclusive proof of liability at the civil trial. The defendant may introduce evidence that creates doubt as to whether he was in fact guilty.[94]

This discussion about the admissibility of a guilty plea in a subsequent civil proceeding is a roundabout way of introducing the plea of *nolo contendere*. Canadian criminal law does not permit a plea of *nolo contendere*. In contrast, this plea is generally permitted in the United States. The plea of *nolo contendere* (meaning "I will not contest it") differs from a plea of guilty primarily in that it may not be put into evidence in a subsequent civil action as proof of the fact that the accused committed the crime.[95]

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90. Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (1769, reprinted, Oxford: Clarendon Press, 1966) at 327.

91. Ibid. at 327-28.

92. Ibid. at 328-29.

93. See, e.g., *Cromarty* v. *Monteith* (1957), 8 D.L.R. (2d) 112 (B.C.S.C.).

94. See, e.g., *Brown* v. *Wilson* (1975), 66 D.L.R. (3d) 295 (B.C.S.C.).

95. American Bar Association, *supra*, note 84 at 14-1.1. H.C. Black, ed., *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979) at 945, defines the plea of *nolo contendere* in part as:

> Type of plea which may be entered with leave of court to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be

## C. Procedural Matters

### 1. Appearance in Court to Enter the Plea

Section 650 of the *Code* requires that, subject to limited exceptions, an accused must be present in court for the whole of his trial. Thus, in general, the accused must be present in court for the entering of the plea. However, for summary conviction proceedings greater flexibility is permitted, and in some cases the accused need not be present at all. In such proceedings, for reasons of convenience and because the matters charged are of a minor nature, subsection 800(2) permits him to direct counsel or agent to appear. The court, however, may require the accused to appear personally.

In *R.* v. *Bardell,* a summary conviction case, it was held that if neither the accused nor counsel were physically present in court, the accused did not appear. Thus, a plea of guilty made over the telephone by the accused with the consent of the prosecutor was declared to be a nullity.[96]

In *R.* v. *Fecteau*, a case involving both summary and indictable charges, it was held that appearing and pleading guilty to crimes by way of live closed-circuit television, absent clear waiver by the accused to being physically present in court, violated section 650 of the *Code*.[97] Yet recently in Quebec, a person jailed in a federal penitentiary for committing a crime in Canada pleaded guilty by telephone to a judge in New Jersey in relation to a crime committed in the United States, and received his sentence from the judge.[98]

Special procedures are provided in relation to corporations. Subsection 556(1) provides that an accused corporation shall appear before a provincial court judge by counsel or agent, while subsections 556(2) and (3) state what the powers of a provincial court judge are in the event of non-appearance or non-election by the accused corporation. Section 620 provides that every corporation against which an indictment is found shall appear and plead by counsel or agent. Section 621 provides that where an indictment is found against the corporation, the clerk of the court shall serve notice of the indictment upon the corporation. The notice, in addition to setting out the nature of the indictment, must advise that unless the corporation appears and pleads within seven days after service of the notice, the court will enter a plea of not guilty and the trial will proceed. Section 622 provides for the procedure on default of appearance, while

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imposed pursuant to it. The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts. As such, this plea is particularly popular in antitrust actions (*e.g.* price fixing) where the likelihood of civil actions following in the wake of a successful antitrust prosecution is very great.

96. (1987) 78 A.R., 322 (Q.B.).

97. (1989) 71 C.R. (3d) 67 (Ont. H.C.).

98. See M.C. Auger, "Première mondiale: jugé par téléphone," *Le Devoir* (Montreal, 15 March 1989) at 1, 10.

section 623 provides for the trial of the corporation after a plea is made or entered. Subsection 800(3) provides a similar power in respect of summary conviction offences.

## 2. Calling on the Accused to Plead

Arraignment is the technical term for the process of calling the accused before the court, reading the charge, and requesting a plea to it.[99] The plea is not part of the arraignment but is instead a response to the arraignment.[100] The plea is a necessary precondition to a trial. A trial is essentially an examination of the merits of the pleas of the opposing parties, so that until the pleas have been entered there is nothing for the court to try.[101]

The *Code* provisions on arraignment are not comprehensive. For example, with respect to indictable offences there are no provisions on arraignment, only on pleas. Subsection 606(1) states only that the accused who is called upon to plead may plead guilty, not guilty, or the special pleas specifically authorized by Part XX. In contrast, in relation to summary conviction offences section 801 deals more specifically with arraignment. It provides, in part, that where the defendant appears the substance of the information shall be stated to him, and he shall be asked whether he pleads guilty or not guilty to the information. It has been held that stating the substance of the charge means requiring, in addition to the formal charge being read to the accused, that some explanation or description of the charge be made to the accused.[102] However, the formalities of the arraignment can be waived by the accused.[103]

As regards reading the charge to the accused, the English case of *R.* v. *Boyle* held that the appropriate procedure where the accused is charged with more than one count in an indictment is to have the judge read each count separately and ask the accused to plead to each separately.[104] In this way there is no possible confusion as to which count the accused intended to plead.

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99. See Blackstone, *supra*, note 90 at 317.

100. *R.* v. *Markwart* (1984), 54 A.R. 121 at 123-124 (Q.B.).

101. *Clement* v. *The Queen* (1955), 22 C.R. 290 (Que. C.A.).

102. *R.* v. *Foster* (1967), 10 C.L.Q. 120 (B.C. Co. Ct.).

103. *L'Heureux* v. *Deshaye* (1983), 25 Sask. R. 141 (Q.B.), aff'd (1983) 34 Sask. R. 47 (C.A.), leave to appeal to the Supreme Court of Canada refused [1984] 1 S.C.R. ix.

    It should be remembered that, where the person charged with a crime is a young offender, the *Young Offenders Act*, R.S.C. 1985, c. Y-1 applies. Among other issues, it regulates in s. 12 the appearance of a young offender in youth court (personal attendance is required), the reading of the information to the young offender, the waiver of such a reading, and the judge's duty, where the young offender is unrepresented by counsel, to inquire into the adequacy of a plea made by the young offender. This Working Paper does not in any way propose changes to the *Young Offenders Act*: we concentrate exclusively on reforms to the *Criminal Code*.

104. [1954] 2 Q.B. 292 (Ct. Crim. App.).

3. Who May Enter the Plea

While in most cases the accused would no doubt plead personally, it is not a requirement that he do so: counsel for the accused may plead instead.[105] Indeed, for those summary conviction cases where the accused has designated counsel or agent to appear, the plea may be made by such counsel or agent. As mentioned above, a corporation, being an artificial entity, pleads through its counsel or agent.

4. Consequences of a Failure or Refusal to Plead

Formerly, the criminal law used draconian means to force a person to plead. From the thirteenth to eighteenth centuries an accused in England who refused to plead in relation to most felonies was tortured into pleading by means of the pressure of weights placed on the body. Still, some accused preferred to be pressed to death by this *peine forte et dure* in order to avoid the forfeiture of property that would result from a conviction. This was changed by means of a more humanitarian and eminently logical common law rule that refusal to plead would be taken as a plea of not guilty.[106] This is now provided, at least in relation to indictable offences, by subsection 606(2) of the *Code* to the effect that where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty. It has been held that, although not set out expressly by statute, a similar power arises in relation to summary conviction offences.[107]

5. Adjournments to Facilitate the Taking of a Plea

Subsection 606(3) of the *Code* provides in part that an accused is not entitled as of right to have the trial postponed but that the court may, if it considers that the accused should be allowed further time to plead, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, upon such terms as the court considers proper.

6. Pleading Guilty to Included or Related Crimes

Subsection 606(4) of the *Code* provides that where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty. If such plea is accepted, the court shall find the accused not guilty of the offence charged and find him guilty of the offence in

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105. See, e.g., *R.* v. *Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused [1970] S.C.R. xi; *R.* v. *Sommerfeldt* (1984), 14 C.C.C. (3d) 445 (B.C.C.A.).

106. G. Williams, *The Proof of Guilt* (London: Stevens & Sons, 1963) at 12-13.

107. *Re Mohammed and The Queen* (1985), 19 C.C.C. (3d) 475 (Ont. H. C.).

respect of which the plea of guilty was accepted and enter those findings in the record of the court. It appears that the court has a duty to be satisfied that the facts do not support a finding of guilt for the greater crime charged before accepting the plea to the lesser charge.[108] The precursor to this provision was created to alter the former law as set out in *R.* v. *Dietrich*.[109] In that case, the Ontario Court of Appeal held that where an accused was charged with what was then capital murder, the trial judge had no jurisdiction to accept a plea of guilty to the included charge of non-capital murder because sufficient evidence had to be introduced to enable the jury to reach a verdict on the included charge.

Prior to the *Criminal Law Amendment Act, 1985*, this provision was more narrowly worded. It permitted the accused, with the consent of the prosecutor, to plead guilty to "an included or other offence". In *R.* v. *Hogarth*[110] the Ontario Court of Appeal quashed the conviction of a person who, on a charge of stealing a motor vehicle with a value of over two hundred dollars, had pleaded guilty to a lesser though not included crime of driving the motor vehicle without the owner's consent. The Court held that the words "an included or other offence"[111] restricted the acceptance of a guilty plea to: (a) an included offence; (b) any other offence of which the accused could by law be convicted on the indictment before the court (e.g., then subsection 589(3) [now subsection 662(3)] provides in part that where the indictment is for murder but the evidence proves only infanticide, the accused can be convicted of infanticide); or (c) any offence included by virtue of the wording of the indictment. In this case the indictment was not so worded as to include the lesser crime and so no plea to it was permitted. The *Criminal Law Amendment Act, 1985* altered the wording of then subsection 534(4) [now subsection 606(4)] to "guilty of any other offence arising out of the same transaction, whether or not it is an included offence".[112] Presumably this amendment would now permit a court to accept a plea of guilty to a crime similar to that made in *Hogarth*, on the ground that it would arise "out of the same transaction".

Given this state of the law, what is the effect of pleading guilty to a crime in circumstances not falling within the conditions imposed by subsection 606(4) of the *Code*? In *R.* v. *Pentiluk*[113] the Ontario Court of Appeal held that where the accused pleads not guilty to the crime charged but guilty to an included crime and that plea is not consented to by the prosecutor, the only plea made is one of not guilty to the crime charged: the plea of guilty to the included crime is a nullity.

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108. *R.* v. *C.H.O.* (1987), 83 A.R. 33 (Prov. Ct.). For a discussion of subsec. 606(4) of the *Code* in the context of plea bargaining, see LRC, *Plea Discussions and Agreements*, Working Paper 60 (Ottawa: The Commission, 1989).

109. [1968] 4 C.C.C. 361.

110. (1976) 31 C.C.C. (2d) 232.

111. *Criminal Law Amendment Act (No. 2), 1976*, S.C. 1974-75-76, c. 105, s. 7.

112. *Supra*, note 17, s. 125. This subsection also provides for formal recording of the crime in relation to which the guilty plea was accepted.

113. (1974) 21 C.C.C. (2d) 87, aff'd [1977] 2 S.C.R. 832. See also *R.* v. *Conway*, [1989] 1 S.C.R. 1659 at 1669-1670 *per* L'Heureux-Dubé J.; *contra*, *R.* v. *St-Jean* (1970), 15 C.R.N.S. 194 (Que. C.A.).

7. Judicial Control of Acceptance or Withdrawal of Guilty Plea

Because a plea of guilty has such grave consequences for the accused, the courts have insisted that the plea be made voluntarily and that it be based on an appreciation of the nature of the charges and of the consequences of the plea. Thus, where a plea of guilty is offered and there is reason to doubt that the accused understands what he is doing, the judge ought to inquire to ascertain whether the person does so understand. The extent of the inquiry will vary with the seriousness of the charge.[114]

Nonetheless, case law is clear that a trial judge is not bound in all cases to conduct an inquiry after a guilty plea has been made. Moreover, the exercise of the trial judge's discretion to accept, reject, or permit withdrawal of the guilty plea will not be lightly interfered with. The leading case in point is *Adgey* v. *The Queen*.[115] The accused had pleaded guilty to several charges of theft, fraud, and break and enter. He was represented by counsel. After each plea, the police gave facts relating to the charges and the trial judge gave the accused an opportunity to explain. However, the trial judge did not inquire as to whether the accused understood the charges or had pleaded voluntarily. The issue was whether, having heard the explanation, the trial judge erred in failing to strike the guilty pleas. The majority of the Supreme Court of Canada ruled that under the circumstances the judge's discretion not to permit the withdrawal of the guilty plea should not be interfered with. Dickson J., as he then was, laid down the following guidelines in the exercise of that discretion:

> If the trial judge chooses to hear evidence, for the purpose of satisfying himself that the charges are well founded or in order to have a factual background prior to imposing sentence, the evidence may indicate the accused never intended to admit to a fact which is an essential ingredient of the offence with which he is charged or he may have misapprehended the effect of the guilty plea or never intended to plead guilty at all, in any of which events the judge may, in his discretion, direct that a plea of not guilty be entered or permit the accused to withdraw his original plea and enter a new one.[116]

A plea of guilty may be permitted to be withdrawn at the discretion of the judge at any time prior to the imposition of sentence.[117]

Cases decided since *Adgey* have helped to illustrate more precisely when the trial judge's acceptance, or refusal to permit withdrawal, of a guilty plea is a failure to act judicially. For example, where the accused pleads guilty in order to avoid being placed in a worse position while awaiting trial than if he had pleaded guilty in the first

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114. *Brosseau* v. *The Queen*, [1969] S.C.R. 181.

115. *Supra*, note 83. See also *Brosseau* v. *The Queen*, *supra*, note 114.

116. *Adgey* v. *The Queen*, *supra*, note 83 at 430.

117. See *R.* v. *Kavanagh* (1955), 114 C.C.C. 378 (Ont. C.A.).

place,[118] or where the accused was pressured by counsel into pleading guilty,[119] the courts have permitted the withdrawal of the plea. On the other hand, courts may accept a guilty plea notwithstanding that the prosecution has evidence that the accused was insane at the time the act was committed. Thus, in *Re Regina and Pooley*[120] it was held that the judge's discretion to accept a guilty plea permitted him to refuse to receive the prosecutor's evidence of insanity. In *Antoine* v. *The Queen*[121] the Quebec Court of Appeal stated that cases would be rare in which an inquiry into the voluntariness of a plea of guilty would be necessary where the accused was represented by counsel. The Court also refused to permit the accused to withdraw his plea of guilty because the sentence he received was greater than the one expected. The courts have also ruled that the guilty plea of an accused should stand, notwithstanding that at the time of the plea he was unaware that the prosecutor would then apply to have him declared a dangerous offender, as a result of which the accused would run the risk of indeterminate detention.[122]

## III. Verdicts

### A. Introduction

As noted, when the accused pleads not guilty to the crime charged, a train of events is set in motion that leads ultimately to the holding of a trial. At trial, after the hearing of evidence, the judge, or the jury where there is one, must decide whether the charge has been proved beyond a reasonable doubt. This decision is called the verdict.

### B. General Matters

#### 1. Permitted Verdicts

##### *(a) Verdict of Guilty or Not Guilty*

The judge or jury hearing the evidence at trial generally renders a verdict to the effect that the accused is guilty or not guilty of the crime charged. A verdict of guilty means the accused has been found to have committed the crime charged. Its effect is clear: the accused is subject to the range of punishment imposed by Parliament.

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118. *Cesari* v. *The Queen* (1986), 50 C.R. (3d) 93 (Que. C.A.). The accused, having failed to attend at trial in first instance in the mistaken belief that he would be sent another notice of the date for trial, was ordered detained until the trial a week later. To avoid this detention, the accused pleaded guilty.

119. *R.* v. *Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.).

120. (1974) 17 C.C.C. (2d) 168 (B.C.S.C.).

121. (1984) 40 C.R. (3d) 375, aff'd [1988] 1 S.C.R. 212.

122. See *R.* v. *Lyons*, [1987] 2 S.C.R. 309; *R.* v. *Benoit* (1987), 34 C.C.C. (3d) 249 (Nfld. C.A.).

The effect of a verdict of not guilty is more problematic. There are two possible views of what a verdict of "not guilty" means. One view is that the verdict means only that the accused has not been proved guilty beyond a reasonable doubt.[123] The other view is that the verdict is equivalent to a finding of innocence, on the ground that since the accused is presumed innocent at the outset, the verdict of "not guilty" should be taken to convert the presumption of innocence into the fact of innocence.[124] Canadian law adopts the latter view.[125]

Even though a verdict of not guilty is equivalent to a finding of innocence, its effect is strictly limited to exculpating the accused. It does not, as it were, transform a shield into a sword by implying that, simply because the accused has been acquitted, others are guilty of criminal conduct.[126]

The verdicts of guilty and not guilty are not the only verdicts available in our law. The *Criminal Code* currently permits the rendering of special verdicts in two situations: (a) cases where the insanity defence is raised and (b) cases where the crime of publishing a defamatory libel is charged.

### *(b) Special Verdict of Acquittal on Account of Insanity*

Both the current *Criminal Code*[127] and the Commission's proposed Criminal Code provide for the defence of insanity or, in modern terms, "mental disorder."[128] As Report 31, *Recodifying Criminal Law* states: "Those not in their right mind and therefore not responsible for their actions should not be punished."[129]

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123. See J.W.C. Turner, ed., *Kenny's Outlines of Criminal Law*, 19th ed. (Cambridge University Press, 1966) at 616 n. 6, where it is argued that the verdict of "not guilty" means that there is not full legal proof of guilt, but not necessarily that the jury think the accused innocent. For a discussion of the difference between verdicts of "not guilty" and "innocent", see V.T. Bugliosi, "Not Guilty and Innocent — The Problem Children of Reasonable Doubt" (1983) 4 *Miss. C.L. Rev.* 47.

124. See Friedland, *supra*, note 1, where it is stated at 129 that: "As a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence. The accused starts the trial under the mantle of the presumption of innocence. If he is acquitted, he should not be in a worse position than he was before his acquittal." See also *R.* v. *Plummer*, [1902] 2 K.B. 339 (C.C.R.) at 349 *per* Bruce J.: "I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates."

125. See *Grdic* v. *The Queen*, *supra*, note 53 at 825, where Lamer J., *obiter*, approves of Friedland's statement, *supra*, note 124. To do otherwise, Lamer J. argues, would be to introduce the verdict of "not proven" into Canadian law.

126. See M.H.L., "The Meaning of a Verdict of Not Guilty" (1956), 120 *Just. P.* 358.

127. *Criminal Code*, s. 16.

128. Report 31, *supra*, note 3, clause 3(6) at 33. Recent federal initiatives also favour the term "mental disorder". See generally, R.M. Gordon and S.N. Verdun-Jones, "The Trials of Mental Health Law: Recent Trends and Developments in Canadian Mental Health Jurisprudence" (1988), 11 *Dalhousie L.J.* 833.

129. *Supra*, note 3 at 33.

Our present law nevertheless treats the defence of insanity differently from other defences because the person found to be insane is often perceived as being dangerous to society, and this generally results in the person's confinement until such time as he is determined to be not dangerous.[130] Thus, subsection 614(1) of the *Code* provides that where, at the trial of an accused charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted, the jury or, where there is no jury, the judge or provincial court judge "shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity." Under subsection 614(2), where the accused is found to have been insane at the time the offence was committed, the court, judge or provincial court judge before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or provincial court judge directs, until the pleasure of the lieutenant governor of the province is known. Usually this means, subject to regular review as to the necessity of such detention, indeterminate detention pursuant to a lieutenant governor's warrant.[131] Other *Code* provisions flesh out the powers of the lieutenant governor and the review process.[132]

### *(c) Special Verdict for the Crime of Defamatory Libel*

At common law, special verdicts in criminal cases were verdicts in which the jury, not wishing to decide upon the law, made findings on the facts specially, and referred these findings to the court to say whether on the facts the prisoner was or was not guilty of the crime alleged.[133] However, with one exception the *Code* does not currently permit special verdicts. Section 317 provides that, in cases of criminal defamatory libel, the jury may give a general verdict of guilty or not guilty, or may find a special verdict. This section is derived from *Fox's Libel Act* of 1792. Prior to the passage of that Act, the common law had held that a jury could only decide that the accused had published the libel, not whether the matter published was libellous. *Fox's Libel Act*, however, changed the law by enabling the jury to decide on the whole matter in issue.[134]

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130. This area is presently under review within the Department of Justice and legislation along the lines previously tabled is expected in the near future. See Gordon and Verdun-Jones, *supra*, note 128.

131. *Criminal Code*, s. 617.

132. *Criminal Code*, ss. 617, 618, 619.

133. J.F. Stephen, *A History of the Criminal Law of England*, vol. 1 (New York: Burt Franklin, 1883) at 311. An example of a special verdict is the famous case of *R.* v. *Dudley* (1884-85), 14 Q.B.D. 273.

134. See Stephen, *supra*, note 133, vol. 2 at 330-62 for a discussion of the common law and how *Fox's Libel Act* altered it.

2. Impermissible Verdicts

Other jurisdictions provide for verdicts other than "guilty" or "not guilty." In Scotland there is the additional verdict of "not proven," which means that there is no full legal proof of guilt, not that the court necessarily considers the accused innocent.[135] The verdict of "not guilty" is accordingly reserved for those cases where the jury positively believes that the accused did not commit the crime.[136] However, Canadian law regards the acquittal of an accused upon a verdict of "not guilty" as equivalent to a finding of innocence, thereby rejecting the notion of a verdict of "not proven."[137]

## C. Procedural Matters

### 1. Verdicts Available Where "Included" or "Alternative" Crimes[138] Are Proved

Generally, an accused can only be convicted of the crime actually charged in an information or indictment. However, there are exceptions. The first relates to an attempt to commit a crime. Under section 660 of the *Code*, where the evidence falls short of proving the commission of the offence charged but proves an attempt to commit the offence, the accused may be convicted of the attempt. Section 661 provides that where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the jury may convict of the attempt or the judge may discharge the jury from giving a verdict and direct that the accused be indicted for the complete crime. (As noted earlier, subsection 661(2) provides that if the accused is convicted of the attempt charged, he is not liable to be tried again for the offence that he was charged with attempting to commit.)

The second exception relates to subsection 662(1), which generally governs "included offences":

> 662. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
>
> (*b*) of an attempt to commit an offence so included.

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135. See *Kenny's Outlines of Criminal Law*, *supra*, note 123 at 616 n. 6.

136. In *McNicol* v. *H.M. Advocate*, [1964] S.L.T. 151, the Justice-General argued in favour of the "not proven" verdict on the ground that it is a logical alternative to the verdict of guilty, which means that it was proved beyond a reasonable doubt that the accused committed the crime. This left the verdict of "not guilty" to be reserved for those cases where the jury positively believed that the accused did not commit the crime. See also A.R. Brownlie, Commentary: *McNicol* v. *H.M. Advocate*, [1964] *Crim. L. Rev.* 726 at 727: "The bastard verdict has the merit of preserving to the alternative form what English criminal law lacks — a positive verdict of innocence."

137. See Lamer J.'s statement in *Grdic* v. *The Queen*, supra, note 53.

138. Much of the following discussion is based on J. Atrens, "Included Offences and Alternative Verdicts" in Atrens, Burns and Taylor, *supra*, note 12 at XI-i.

Thus, it provides two ways by which a crime can be included in another: (a) where it is included by reason of the statutory description of the crime, or (b) where it is included by reason of the drafting of the charge in the count. A simple example of the first would be that the crime of publishing a defamatory libel is included in the crime of publishing a defamatory libel knowing it to be false. An example of the second would be where a person robbed another with the use of a firearm and the count charging robbery specified those facts. Robbery can of course be committed without the use of a firearm, but on the facts outlined in the charge the latter is an included crime. In this regard, the Commission's Working Paper on *The Charge Document in Criminal Cases* recommended that the doctrine of included crimes should clearly exclude crimes that may be included as a matter of drafting.[139]

The key issue here is what constitutes an "included" crime. The courts have reiterated two major principles governing when one crime is included in another. First, an included crime is necessarily part of the main crime. Thus, the crime charged must necessarily include all the essential elements of the included crime. Second, the crime charged must be sufficient to inform the accused of the crime included in the main crime.[140]

The determination of when one crime is necessarily included in another "as described in the enactment" usually involves a consideration of what the common law or decided cases have determined is included, and this is not always easy to establish. Two cases illustrate this.

In *Luckett* v. *The Queen*[141] the accused was charged with committing the crime of robbery. The definition of the crime of robbery in the *Criminal Code* sets out in separate paragraphs four different ways of committing the crime:

> 343. Every one commits robbery who
>
> (*a*) steals, and for the purposes of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
>
> (*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
>
> (*c*) assaults any person with intent to steal from him; or
>
> (*d*) steals from any person while armed with an offensive weapon or imitation thereof.

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139. LRC, *The Charge Document in Criminal Cases*, Working Paper 55 (Ottawa: The Commission, 1987) at 24-27.

140. *R.* v. *Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122 (Ont. C.A.). See also *R.* v. *Morehouse* (1982), 65 C.C.C. (2d) 231 (N.B.C.A.), leave to appeal to the Supreme Court of Canada refused [1982] 1 R.S.C. xi.

141. [1980] 1 S.C.R. 1140. For a criticism of *Luckett*, see A. Gold, "Included Offences" (1979-80), 22 *CLQ* 187.

The accused was convicted not of robbery but of assault, on the ground that, by reason of the definition, assault was an offence included in the crime of robbery. The accused argued that assault was not an included crime beause it was not a necessary ingredient of the crime of robbery: after all, robbery could be committed in ways other than by assault with intent to steal — e.g., stealing while armed with an offensive weapon. The Supreme Court of Canada, however, held that assault was an included crime. While subsection 662(1) required, in this case, that the included crime be described in the enactment creating the crime charged, the Supreme Court held that for a crime to be an included crime it was sufficient that it be present in any of the paragraphs that set out alternative ways of committing the crime.

The Ontario Court of Appeal was subsequently called upon to consider *Luckett* in *R.* v. *Simpson (No.2).*[142] The accused was charged with attempted murder, defined by section 222 [now s. 239] of the *Code* as an attempt ''by any means'' to commit murder. The defence argued that, because of *Luckett*, a variety of other crimes were included in the attempted murder charge — the crimes, as then defined, of causing bodily harm with intent to wound, assault causing bodily harm, or unlawfully causing bodily harm. The argument was that *Luckett* no longer required that a crime had to be necessarily included in the enactment describing the greater crime, and that these crimes fell within the description of the crime as an attempt ''by any means'' to commit murder. The Court of Appeal rejected the argument. *Luckett*, it believed, did not really depart from the ''necessarily included'' test: it merely refined it. In the case where a crime may be committed in the ways described in the subsections, the accused may be convicted of any crime ''necessarily included'' in any of the ways in which the crime may be committed. While the Court gave the ''necessarily included'' test a broad meaning, it ruled that the wording in section 222 of attempted murder ''by any means'' did not describe various ways in which the crime could be committed, and so no included crimes were available on that basis.

The third exception to the rule that an accused can only be convicted of the actual crime charged relates to subsections 662(2) through (6) of the *Code*, which expressly provide that certain crimes charged can give rise to convictions on specific lesser crimes. Any problems that may arise as to whether these lesser crimes are ''necessarily included'' in the more serious crimes are thereby avoided. Under subsection 662(2), where a person is charged with first degree murder, the jury may, where the evidence proves only second degree murder, find the accused guilty of second degree murder or an attempt to commit second degree murder. Under subsection 662(3), on a charge of murder, the jury may find the accused guilty of manslaughter or infanticide only. Under subsection 662(4), where a count charges murder of a child or infanticide but the evidence proves only commission of the crime of concealing the body of a child (s. 243), the jury may find the accused guilty of that crime. Under subsection 662(5), where a count charges the crimes of causing death by criminal negligence (s. 220), causing bodily harm by criminal negligence (s. 221), or manslaughter (s. 236) arising out of the operation of a motor vehicle or the navigation or operation of an aircraft or

142. *Supra*, note 140.

vessel but the evidence proves only the operation of such a vehicle, etc., in a manner dangerous to the public (s. 249), the accused may be convicted of that crime. Under subsection 662(6), where a count charges the crime of break and enter and committing an indictable offence therein (para. 348(1)(*b*)) and the evidence proves only break and enter with intent to commit an indictable offence (para. 348(1)(*a*)), the accused may be convicted of that crime.

## 2. The Motion for a Directed Verdict

What happens when, after the prosecutor's case has been made, there appears to be no evidence to support the charge made against the accused? To require the trial to continue in such circumstances would obviously be wasteful. Consequently, the law has created a procedure that has the effect of ending the trial at that time. As Glanville Williams explains:

> Counsel for the defence need not wait for the conclusion of all the evidence before attempting to bring the proceedings to a speedy conclusion. He may submit that there is "no case to answer" at the close of the prosecution's case. Known in England as a "submission of 'no case,' " this is more elegantly termed in Canada an application (or motion) for a directed verdict or "motion to dismiss" or "motion for nonsuit" — the last being the expression used historically in civil cases.[143]

The test for when it is appropriate for a judge to grant a motion for a directed verdict of acquittal has been a longstanding and rather controversial issue. Central to an understanding of the controversy is an appreciation of the different functions of judge and jury.

Where the trial involves both a judge and jury, the role of the judge is strictly limited to matters of law, not matters of fact. The finding or determination of facts is the proper role of the jury. Hence, the courts have been careful to ensure that a motion for a directed verdict will succeed only where the judge is able to answer a question of law, namely, whether there has been an "absence of" or "no" evidence[144] (in essence, a total failure of evidence on the charge alleged). The same motion involving the same principle may be brought where there is a trial before a judge alone.

The applicable test is therefore whether there is any admissible evidence upon which a reasonable jury properly instructed could return a verdict of guilty.[145] If so, the judge must not direct the jury to enter a verdict of acquittal. Where the judge sits without a jury he becomes the trier of fact and where the motion is granted the entry of a verdict of acquittal is performed by the judge.

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143. G. Williams, "The Application for a Directed Verdict — I", [1965] *Crim. L.R.* 343 at 344.

144. See *R.* v. *Paul*, [1977] 1 S.C.R. 181.

145. *United States of America* v. *Shephard*, [1977] 2 S.C.R. 1067 at 1080 *per* Ritchie J.

Recent Supreme Court cases emphasize the stringent nature of the directed verdict test. In *Mezzo* v. *The Queen*[146] it was held that a judge could not direct a verdict of acquittal on the ground that the quality of the evidence was dubious (in this case, the quality of evidence of identification of the accused obtained by allegedly improper police procedures). And in *R.* v. *Monteleone*[147] it was made clear that, in a case where the evidence against the accused is entirely circumstantial, there is no requirement that in order for the motion to be denied, the evidence must satisfy the requirements of what is known as the rule in *Hodge's Case*.[148]

The judge is required to rule on the motion for a directed verdict at the time the Crown's case is ended, and not to postpone the decision on the motion until such time as the accused has elected whether or not to call evidence.[149]

There is, however, some question as to whether an accused may apply for a directed verdict of acquittal on a more serious charge where there is evidence of a lesser or included crime. In *R.* v. *Andrews*[150] the British Columbia Court of Appeal took the traditional view that if there was evidence to go to the jury upon which the jury could convict of a lesser or included crime, the case should not be taken from it until the end of the trial. Hence, in that case the trial judge could not direct that the jury acquit the accused of first degree murder at the end of the Crown's case and then continue the proceedings on an included offence such as second degree murder. In *Titus* v. *The Queen*[151] the Supreme Court of Canada decided that on a charge of first degree murder the accused may move for a directed verdict on the charge of first degree murder if there is no evidence of that crime, and the case should be allowed to continue on the charge of second degree murder.[152] The better view is therefore that a directed verdict of acquittal is possible in such circumstances.

Additional procedural requirements are present in the motion for a directed verdict. Where there is a jury present, the proper practice is for the judge, upon finding that

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146. [1986] 1 S.C.R. 802. For a criticism of *Mezzo*, see Annotation (1986), 52 C.R. (3d) 113 at 114; R.J. Delisle, "Evidence — Tests for Sufficiency of Evidence: *Mezzo* v. *The Queen*" (1987), 66 *Can. Bar Rev.* 389.

147. [1987] 2 S.C.R. 154.

148. (1838) 2 Lewin 227, 168 E.R. 1136. The rule in *Hodge's Case* provides that where a case rests on entirely circumstantial evidence, before the accused could be convicted the jury must be satisfied not only that the circumstances were consistent with the accused having committed the crime but that the facts were such as to be inconsistent with any rational conclusion other than that the accused was guilty.

149. *R.* v. *Boissonneault* (1986), 29 C.C.C. (3d) 345 (Ont. C.A.).

150. (1979) 8 C.R. (3d) 1.

151. [1983] 1 S.C.R. 259.

152. In *Titus*, ibid., the Court found error in the trial judge's failure to grant a motion for the directed verdict on first degree murder. The prejudice, however, was offset by a direction by the judge to the jury that there could be no conviction on that charge.

there is no evidence to go before a jury, to direct the jury to acquit and discharge the accused.[153] A judge who instead withdraws the case from the jury errs in so doing.[154]

### 3. When a Jury's Verdict May Be Taken

Under section 654, the taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday. By this means the *Code* dispenses with the common law rule that certain days, such as Sundays, were *dies non juridicus*, days on which no judicial act could be performed.[155]

153. *Walker* v. *The King*, [1939] S.C.R. 214.

154. *R.* v. *Steele* (1939), 73 C.C.C. 147 (P.E.I.S.C.).

155. See R.E. Salhany, *Canadian Criminal Procedure*, 5th ed. (Aurora, Ont.: Canada Law Book, 1989) at 297.

# CHAPTER TWO

# The Need for Reform

## I. General Principles

It is surprising that the areas of law addressed in this Working Paper have been so long ignored. The subjects surveyed are complex and include a number of important policy questions. Particularly thorny is the issue of double jeopardy. The first paragraph of Professor Friedland's text on *Double Jeopardy* reveals why the subject is not a simple one:

> The history of the rule against double jeopardy is the history of criminal procedure. No other procedural doctrine is more fundamental or all-pervasive. 'At the foundation of criminal law', wrote Rand J. of the Supreme Court of Canada, 'lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter ....' Double jeopardy plays a major role in such areas as recharging an accused with the same or another offence, new trials, Crown appeals, discharging the jury, framing an indictment, sentencing on multiple counts, withdrawing a plea, the relationship between courts, and the recognition of foreign criminal judgments.[156]

Moreover, the courts have been extraordinarily active in the double jeopardy area over the last dozen years, which is not the case with respect to some of the other matters addressed in these pages. The Supreme Court has been called upon to consider at least six double jeopardy cases[157] of significance in the eight years since the *Charter* was introduced.

As the preceding chapter dealing with the existing law on this subject indicates, the statutory treatment of double jeopardy is extremely sparse. This can be contrasted with some of the classic American attempts to adequately codify the law, for example, the Brown Commission Code of 1971[158] and the American Law Institute's *Model Penal Code*.[159] Whereas (counting titles to sections) the Brown Commission Code contained

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156. Friedland, *supra*, note 1 at 3.

157. *Krug* v. *The Queen*, supra, note 41; *R.* v. *Prince, supra*, note 42; *R.* v. *Wiggleworth, supra*, note 48; *R.* v. *Moore, supra*, note 24; *R.* v. *Provo, supra*, note 79; *R.* v. *Van Rassel, supra*, note 19.

158. National Commission on Reform of Federal Criminal Laws, *Final Report: A Proposed New Federal Criminal Code (Title 18, United States Code)* (Washington, D.C.: U.S. Government Printing Office, 1971) (The Brown Commission).

159. American Law Institute, *Model Penal Code, Proposed Official Draft* (Philadelphia, Pa.: The Institute, 1962). For an earlier and fuller discussion of the *Model Penal Code*'s proposals in this area, see American Law Institute, *Model Penal Code, Tentative Draft No. 5* (Philadelphia, Pa.: The Institute, 1956) ss. 1.08-1.12 at 29-66.

only eight lines on the issue of insanity and 13 on entrapment, it contained 140 lines in seven sections on double jeopardy, not including procedural provisions such as included offences and appeals. The ALI's *Model Penal Code* contained 184 lines on the subject, whereas their territorial jurisdiction provision (also a complex topic) contained only 52 lines.

The point of all this is simply that Canadian law, particularly statutory law, has long been far from comprehensive and, being incomplete, has suffered from a lack of clarity.

The law relating to the other pleas and to verdicts has also suffered from substantial defects, incompleteness and lack of clarity again being among the shortcomings. Many of the provisions that do exist are scattered throughout the *Code*, are difficult to locate, and are not truly consistent. The absence of guiding principles and rational organization are particularly telling defects in the law. These defects are not confined to the areas of double jeopardy, pleas and verdicts — they characterize the procedural provisions of the *Code* as a whole and evidence the need for its reform. A comprehensive recodification based upon known and agreed upon organizing principles is in order. In the Commission's Report 32, *Our Criminal Procedure*, we summarized our philosophy in this regard in the following terms:

> We envision a criminal process governed by rules, simply and clearly expressed, which seeks fairness, yet promotes efficiency; which practises restraint and is accountable, yet protects society; and which encourages the active involvement and participation of the citizen. These basic attributes are the essence of our principles.
>
> Thus, procedures should be fair but should not exact an intolerable price in terms of inefficiency. Inefficient conduct lacks focus, is prone to error and in consequence is costly. These results, in turn, can be manifestations of unfairness in the process. Also, the law can hardly operate in an efficient manner if it is inaccessible, opaque and constantly shifting. It must be clear.
>
> Once the law is accessible and ascertainable it is appropriate to demand conformity with standards of action. Ensuring conformity with and providing remedies in cases of deviation from such standards is what accountability entails. However, in our zeal to clarify, regulate and supervise we must ensure that the law does not overreach. The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary. This is the essence of restraint.
>
> Procedural laws should also provide the individual with a measure of access to, and in some cases, control over the processes which ultimately determine his or her rights and obligations. Such participation enhances the acceptability of the decisions rendered by the process.
>
> Finally, procedural law should protect society and preserve the peace through the manner in which it regulates the formal ways that the public officials carry out their duties and generally serve the public. Procedural law should also protect society through its regulation of the trial process.[160]

160. LRC, *supra*, note 4 at 54.

In the context of this Working Paper, these principles necessitate an inquiry as to whether those accused of crime have adequate protection against double jeopardy and whether the present rules governing pleas and verdicts are appropriate.

In some respects, existing criminal law does provide adequate protection against double jeopardy and appropriate rules governing pleas and verdicts. Consistent with the principles of fairness and accountability, for example, safeguards have been created to prevent the arbitrary use of state power to repeatedly prosecute offenders for the same or a similar crime, or to unjustly convict for more than one crime arising out of the same transaction. Consistent with the principle of protection, for example, the courts have proposed, where the rule against multiple convictions is applied, that the remedy of a conditional stay be entered in relation to the crime for which the accused was not convicted so that the accused cannot escape punishment in relation to that crime in the event that the original conviction for the other crime is overturned on appeal. However, the present *Criminal Code* does contain significant shortcomings that ought to be remedied.

## II. Defects

The existing *Code* regime governing double jeopardy, pleas and verdicts is characterized by an occasional lack of comprehensiveness, confusing procedures, and the existence of anachronisms — three characteristics that offend the principle of clarity. Also evident are a number of procedures that produce undue delay and thereby compromise the principle of efficiency. Finally, there are particular shortfalls in the protections offered to the accused, a situation that calls into question the principle of fairness.

### A. Lack of Comprehensiveness

In our view the lack of a comprehensive statutory scheme in the *Criminal Code* to protect against double jeopardy constitutes a fundamental defect. There are a number of concepts involved in the notion of double jeopardy, including *autrefois acquit* and *convict*, the rule against multiple convictions and its effect on pleas and verdicts, issue estoppel and inconsistent judgments, the extent to which foreign decisions can bar subsequent prosecutions, and so on. Any discussion of double jeopardy issues involves not only the substantive issue of the scope of the rule in question but also other important matters such as the procedure to be followed to raise the issue in the first place and the remedy to be applied. Yet, as we have described above, the *Code* as it stands addresses only some of these issues and leaves the rest to the evolving common law and *Charter* jurisprudence. Appropriate rules governing such issues ought as much as possible to be codified. The aim of ensuring fairness in the treatment of those accused, by preventing possible harassment through multiple convictions or prosecutions for the same matter, is a worthy one that warrants the attention of Parliament.

A lack of comprehensiveness is also evident in the present scheme respecting pleas. For example, the existing law on arraignment is not fully codified. Issues such as whether an accused must personally enter a plea of guilty have been left to be resolved by case law. Also, the *Code* is silent as to when a judge should not accept a plea of guilty to the crime charged or should permit a plea of guilty to be withdrawn. Again, case law has had to resolve these issues. We propose that a statutory scheme be created that would clearly structure the judge's duty in this regard.

Furthermore, the *Code* is not comprehensive in its treatment of directed verdicts, there being no specific rule outlining that an accused may move for a directed verdict and under what circumstances it may be granted.

A comprehensive scheme of criminal procedure also requires that the scheme be organized in a manner that enables the reader to obtain ready access to it. Unfortunately, the *Code* is deficient even in its organization of related sections. For example, to discover the procedure on arraignment one must look both to indictable offences and summary offences procedures, located in separate parts of the *Code*. A better approach would be to consolidate procedures on arraignment and so on in relation to all crimes in order to promote ease of reference. Accordingly, our proposals on double jeopardy, pleas and verdicts are organized in this manner.

In short, where the coverage of the law is incomplete, uncertainty is the result. Uncertainty implies unpredictability — a state of affairs at odds with the notion of the rule of law. Citizens should not have to confront the unpleasant reality of laws that are mysterious and whose content only becomes known on a case-by-case basis. It is essential that the procedures governing double jeopardy, pleas and verdicts be set out more thoroughly than is presently the case, and in a well-organized manner.

## B. Confusing Procedures

Section 606(1) of the *Code* states that an accused may, in addition to pleading guilty or not guilty, plead special pleas, which under section 607 may include those of *autrefois acquit* and *convict*. Under section 607(3), the special pleas of *autrefois acquit, autrefois convict* and pardon must "be disposed of by the judge without a jury before the accused is called upon to plead further." This creates an impression that such issues can only be raised by way of special plea, when in fact there is no requirement that these issues be raised *only* through a special plea. Recent case law undercuts the clarity of the rule by allowing *autrefois acquit* and *convict* to be raised under the general plea of not guilty. Moreover, other double jeopardy issues such as issue estoppel and the rule against multiple convictions are also raised under the general plea of not guilty. These latter issues are not raised at all by way of special plea. Thus, the present law engenders both confusion by the *Code*'s providing only that *autrefois acquit* and *convict* issues may be raised by way of special plea and inconsistency by permitting other double jeopardy issues to be raised without the need for a special plea. A more

straightforward formulation, one that we favour, would simply provide that all double jeopardy issues may be raised by either pre-trial motion or on motion at trial.

While the law does not currently permit conditional pleas, a plea such as guilty with an explanation appears to be permitted so long as the judge is satisfied that there is an unequivocal intention to plead guilty. Apparently this is allowed because an explanation in these circumstances is a matter more appropriate to sentence than to liability. In our view, if the accused is not liable there should be no guilty plea at all. If liable, the accused should explain, if at all, only at the sentencing stage. Coupling a guilty plea with an explanation confuses liability with sentence, and could well result in further court proceedings to determine whether the accused intended to plead guilty. Our recommendations are designed so as to avoid such confusion.

## C. Anachronistic Provisions

The provisions of the *Code* set out in sections 611 and 612 relating to the special written plea of justification in relation to the crime of defamatory libel are anachronistic. The Commission's Working Paper 35, *Defamatory Libel*,[161] proposed that the crime of defamatory libel be abolished, largely on the ground that the crime was obsolete. It also proposed repealing the special plea of justification to this crime. This proposal was followed by the Commission in its most recent Report on *Recodifying Criminal Law*,[162] in which the crime of defamation has been excluded. The following recommendations reflect this policy decision. Similarly, the provision for a special jury verdict in cases of criminal defamatory libel is now made unnecessary.[163]

Another example of anachronism is the terminology used respecting the special verdict of not guilty by reason of "insanity." In *Recodifying Criminal Law* we argued that the word "mental disorder" was more in line with modern medical and social attitudes.[164] Thus, we propose for consistency a special verdict of not liable by reason of mental disorder.

## D. Procedures That Produce Delay

One defect relating to the special pleas of *autrefois acquit*, *autrefois convict* and pardon and the rule against multiple convictions is the judge-made requirement that they can only be raised at trial. This leads to delay and inefficiency. A revised scheme

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161. LRC, *Defamatory Libel*, Working Paper 35 (Ottawa: Supply and Services Canada, 1984).

162. Report 31, *supra*, note 3.

163. Working Paper 35, *supra*, note 161, rec. 2(a) at 61.

164. *Supra*, note 3 at 33.

should ensure that matters relating to double jeopardy may, where appropriate, be raised at an early time in the proceedings by way of pre-trial motions in a manner that in itself will not produce delay.

## E. Shortfalls in the Protections Accorded to the Accused

The *Code*'s provisions protecting against double jeopardy are inadequate in several instances. First, as noted earlier, Canadian law now offers protection against a Crown prosecutor's unreasonably splitting a case. Yet this protection is limited, as the case of *R.* v. *B.* illustrates,[165] to situations where there is a second trial for the same offence, a relitigation of the merits, or where the Crown's motive is to harass. In our view, a general but not absolute rule against splitting a case is central to the protection against double jeopardy. Our proposals would depart from present law by creating such a rule.

As regards the rule against multiple convictions, we propose a statutory formulation based largely on the rule proposed in the American Law Institute's *Model Penal Code*. This is an attempt to produce a more principled approach to when multiple convictions should be barred. Although intended to generally reflect current law on the rule against multiple convictions, it does propose some expansion of it. Specifically, it proposes altering the law so that a person cannot be convicted of both committing a crime and of conspiracy to commit that crime.

Procedures should also be devised to ensure as much as possible that a plea of guilty is made voluntarily and, if not, that it may subsequently be withdrawn.

Another defect as regards the accused is that the present *Code* provisions on arraignment and pleas have failed to keep up with modern technology. If an accused consents to appear or to plead in writing or by telephone or other means of communication and if the prosecution and the court also consent to this, there should be no bar to the procedure occurring. This would enable an accused to plead without having to travel long distances merely to enter a plea to a charge.

Finally, existing law permits included offences to be created as a matter of drafting. Consistent with our Working Paper on *The Charge Document in Criminal Cases*,[166] this category of included offences should be abolished on the ground that it is unfair to the accused, since liability is determined solely by the ingenuity of the prosecutor who drafts the charge.

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165. *Supra*, note 32.

166. Working Paper 55, *supra*, note 139 at 24-27.

Given these defects, it is manifest that a clearer, more comprehensive, balanced and modern statutory scheme is needed: this is provided for in the following recommendations.

# CHAPTER THREE

# Recommendations

## I. Double Jeopardy

### A. General Matters

**RECOMMENDATION**

Prosecution for Each Crime Permitted Unless Rules against Double Jeopardy Apply

**1. Where the conduct of an accused with respect to the same transaction makes its possible to establish the commission of more than one crime, it should be possible to prosecute the accused for each crime, subject to the following recommendations protecting against double jeopardy.**

Commentary

This proposal makes clear that, subject to the provisions protecting against double jeopardy, the Crown may prosecute an accused for more than one crime arising out of the conduct of the accused. Other modern drafts of criminal statutes (e.g., section 10 of the English Law Commission's *Report and Draft Criminal Code Bill*[167]) contain similar proposals.

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167. See The Law Commission, *A Criminal Code for England and Wales: Report and Draft Criminal Code Bill,* vol. 1 (London: HMSO, 1989) s. 10 at 48. The section states:

> Where an act constitutes two or more offences (whether under any enactment or enactments or at common law or both) the offender is liable, subject to sections 11 (double jeopardy) and 12 (multiple convictions), to be prosecuted and punished for any or all of those offences.

## RECOMMENDATION

Rule against Separate Trials

**2. (1) Unless otherwise ordered by the court in the interests of justice — such as preventing prejudice — or unless the accused acquiesces in a separate trial, an accused should not be subject to separate trials for multiple crimes charged or for crimes not charged but known at the time of the commencement of the first trial that:**

**(a) arise from the same transaction;**

**(b) are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others);**

**(c) are part of a common scheme or plan; or**

**(d) are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s).**

**(2) When the accused is unrepresented, the express consent of the accused to separate trials should be obtained.**

**(3) In assessing whether it is in the interests of justice to have separate trials, a court should be permitted to consider, among other factors:**

**(a) the number of charges being prosecuted;**

**(b) whether the effect of the multiple charges would be to raise inconsistent defences;**

**(c) whether evidence introduced to support one charge would prejudice the adjudication on the other charge(s);**

**(d) whether the case is to be tried by a judge alone or with a jury; and**

**(e) the timing of the motion for severance.**

Commentary

Canadian law has developed to recognize that in certain circumstances splitting a case constitutes an abuse of process. However, this development, while it ensures protection against clearly abusive prosecutions, does not go far enough to ensure protection against double jeopardy. A case in point is that of *R.* v. *B.*[168] The Ontario Court of Appeal held that the subsequent prosecution for incest following an unsuccessful prosecution for sexual assault did not constitute abuse of process because it did not fall within one of the three categories that constituted such abuse, i.e., a second trial for the same crime, a relitigation of the same matter on its merits, or a second trial brought solely to harass the accused. In our view, the appropriate direction should have been to ask whether there was justification for not proceeding with the

168. *Supra*, note 32.

multiple charges at the one trial. Such an approach better secures protection against double jeopardy.

In effect, this proposal incorporates a rule that many commentators view as central to protection against double jeopardy because it prevents, at the outset, the dangers inherent in multiple prosecutions. As Martin Friedland points out:

> [T]he strain of multiple prosecutions is greater than multiple civil actions. The accused is often kept in custody pending the second trial and he will normally have disclosed his case in the first proceeding.... Whereas the defendant in a civil action can be compensated in costs for unwarranted harassment, this is not done in criminal cases. In addition, sound penal policy requires that all aspects of a given course of illegal conduct be determined, if possible, at one time; for example, the threat of a further prosecution may well interfere with rehabilitation. Moreover, a system which permits inconsistent results, particularly in criminal cases, will not 'command the respect and confidence of the public'. Finally, a principal danger inherent in multiple proceedings is that an innocent person may plead guilty or be convicted on a plea of not guilty.[169]

This proposal reflects a reconsideration of previous Commission proposals on the joinder of multiple charges arising out of the conduct of the accused. Working Paper 55, *The Charge Document in Criminal Cases*, recommended the enactment of a certain number of specified, limited grounds that permitted the prosecutor to join charges as counts in a charge document. Specifically, Recommendation 11 provided that:

> Express provisions should state when joinder of ... counts is permissible. The elements of the applicable rules should be some or all of the following:
>
> (a) crimes may be joined as counts in a charge document if
>
> (i) they arise from the same transaction,
>
> (ii) they are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others; this would be consistent with the general relationship between issues of severance and similar fact evidence),
>
> (iii) they are part of a common scheme or plan, or
>
> (iv) they are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s) ...[170]

In short, under the recommendation the prosecutor would continue to have a discretionary power to join charges, albeit a more limited power than is accorded under present law. In addition, it was recommended that the flat prohibition against joining other charges with a charge of murder should be replaced by a more permissive and flexible procedure.

In contrast, this recommendation proceeds from the assumption that joinder should be *mandatory* in those situations set out in the Working Paper on *The Charge Document in Criminal Cases*.[171] The general rule set out in Recommendation 2(1)(a) through (d)

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169. *Supra*, note 1 at 162-63.

170. Working Paper 55, *supra*, note 139 at 35-36.

171. Thus, this proposal adopts in large measure similar proposals for reform in the United States. See, e.g., American Law Institute, *Proposed Official Draft*, *supra*, note 159, subsec. 1.07 (2)(3) at 12; The Brown Commission, *supra*, note 158, subsec. 703(2) at 59.

is modeled on our proposals for the grounds for joining charges as counts in a charge document.[172] It applies whenever the prosecutor is aware of the possibility of multiple charges arising from the same conduct. Not only does it cover cases in which separate charges have in fact been laid; it also covers cases in which just one charge has been laid, but where the prosecutor at the time of commencement of the first trial is aware that another charge could have been laid. Thus, a prosecutor could not avoid application of the rule by seeking a trial only on the one charge before making a final decision as to whether to prosecute on the other.

This requirement of joinder of charges has important implications for an accused who is charged with murder and other crimes arising out of the same transaction that has resulted in loss of life. We recommended in Working Paper 55, *The Charge Document*, that what is now section 589 of the *Criminal Code* be amended to allow the joinder of the crimes of manslaughter, attempted murder, or criminal negligence causing death with a charge of murder. In addition, in the interests of justice any juryable crime could be joined, with the consent of the accused.[173] Parliament has recently enacted an even broader amendment, one with which we are in general agreement. It repeals section 589 and provides instead that "[n]o count that charges an indictable offence other than murder shall be joined in an indictment to a count that charges murder unless (*a*) the count that charges the offence other than murder arises out of the same transaction as a count that charges murder; or (*b*) the accused signifies consent to the joinder of the count".[174] However, the amendment would leave it to the discretion of the prosecutor whether or not to join charges in these circumstances. In contrast, under this recommendation the same general policy is pursued but all crimes charged against an accused that arise out of the same transaction would prima facie be required to be tried together.

There are two exceptions to the general rule. The first is that separate trials are permitted where the court so orders because it is in the interests of justice to do so. For additional clarity, the phrase "in the interests of justice" is stated to include the need to have separate trials in order to avoid prejudice, and it is further defined by Recommendation 2(3), which sets out a list of non-exhaustive factors for the court to consider.

The following examples illustrate the scope of this aspect of the rule. A prosecutor may wish to try an accused with other co-accused, having decided that this is the more efficient way of proceeding before the court, given the evidence as to group participation in the crime. Yet in order to do this it may be necessary to try separately those charges it is alleged all the accused have committed from those that only the one accused is alleged to have committed. In this situation, even though trying together all the charges against the one accused would not necessarily result in prejudice to the

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172. Working Paper 55, *supra*, note 139 at 35-36.

173. Ibid., rec. 13 at 40.

174. Bill C-54, *An Act to amend the Criminal Code (joinder of counts)* 2d Sess., 34th Parl., 1989 (assented to 17 January 1991, not yet proclaimed).

accused, it would be in the interests of justice to have separate trials. Another example centers on the factor set out in Recommendation 2(1)(e), that the timing of a motion for severance may determine whether it is in the interests of justice to grant the motion. Suppose the accused, after being charged and given sufficient time to prepare full answer and defence, on the eve of trial asks the court to sever counts and to order separate trials on them. The court may well conclude that the accused is engaged in a delaying tactic and that it is in the interests of justice to have the trial proceed on all counts.

The second exception to the general rule against separate trials is that separate trials are permitted if the accused acquiesces in that procedure. For example, a prosecutor who feels that to proceed on the multiple charges would be prejudicial to the accused may arrange for separate trials, and such a procedure is permitted if the accused acquiesces in it. This would mean that the prosecutor need not apply to the court for an order for separate trials. The accused could acquiesce by express consent or by any other means (e.g., by not objecting), subject to one exception: where the accused is unrepresented by counsel, Recommendation 2(2) provides that acquiescence must be in the form of express consent. This exception is justifiable on the ground that an unrepresented accused should be fully informed of his rights and should expressly waive them. Where multiple accused are involved, all must acquiesce in order for this exception to be effective.

## RECOMMENDATION

No Subsequent Trial for the Same or Substantially the Same Crime

**3. (1) An accused should not be tried for the same or substantially the same crime for which the accused has been acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned.**

**(2) An accused should not be tried for a crime that was included in the crime of which the accused was acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned, or that was an element of one of the alternative ways specified by statute of committing the crime of which the accused was acquitted, convicted, discharged or pardoned.**

**(3) An accused should not be tried for a crime if the accused has been previously acquitted or convicted, discharged pursuant to what is currently section 736(1), or pardoned in relation to a crime included in, or specified by statute as an element of, one of the alternative ways of committing that crime.**

Commentary

This recommendation covers the traditional special pleas of *autrefois acquit, autrefois convict* and pardon, and replaces the present *Code* sections dealing with them. Non-technical, the section is written in plain language that more clearly conveys its meaning. It prevents a trial for the same crime for which the accused was previously pardoned, acquitted, convicted, or discharged pursuant to what is currently section 736(1) of the *Code*. In substance it reflects existing law, but with some modifications.

Recommendation 3(1) defines the crime respecting which the accused wishes to avoid conviction as one that is "the same" or, in the language of the common law, "substantially the same" as the previously prosecuted crime. This rule is clear enough when a person is to be prosecuted for a crime that is the *same* as the one for which he was previously acquitted or convicted. However, when can a crime be said to be "substantially the same" as the one for which a person was previously acquitted or convicted? One example is the English case of *R.* v. *King*, where the court ruled that an accused convicted of obtaining credit for goods by false pretenses could not later be tried for larceny of the same goods.[175]

The question "When has a person been acquitted?" often has to be decided on a case-by-case basis. Even basic issues have remained unresolved until recent times. For example, it was not until March 1990 that the Supreme Court unequivocally stated that there is no basis for a special plea in subsequent proceedings when a withdrawal of charges has occurred at the very beginning of the prior trial, before any evidence has been adduced.[176] Our forthcoming Working Paper on *Remedies in Criminal Proceedings* will consider whether there should be a means by which a judge would be empowered to clearly indicate in disposing of certain matters when further proceedings are barred. That Paper will discuss the possible creation of a "termination order" that would have the intended effect of *conclusively* terminating proceedings. The concept of a termination order is specifically referred to in Recommendation 10, on the use of pre-trial or trial motions to decide double jeopardy issues. Also, our recent Working Paper on *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* proposes the creation of a prosecutorial power to *permanently* discontinue proceedings.[177]

Recommendation 3(2) ensures that a person who, having been tried for what is described as a "greater crime", cannot in a subsequent prosecution be convicted of what the law defines as an "included crime". The terminology of "included crime", or a crime specified as "an element of one of the alternative ways specified by statute of committing the crime charged", reflects our proposals to reform the law on included

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175. *Supra*, note 18. However, the courts narrowly interpret this test. See *R.* v. *Feeley, supra*, note 31 (conspiracy to commit bribery and conspiracy to effect an unlawful purpose are not substantially the same); *R.* v. *Barron, supra*, note 18 (sodomy and gross indecency are not substantially the same).

176. *R.* v. *Selhi*, [1990] 1 S.C.R. 277.

177. LRC, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: The Commission, 1990) at 101-02.

crimes as outlined in Recommendations 31 and 32 of this Paper. For example, following an acquittal on a charge of assault, an accused cannot later be tried for the included crime of attempted assault. (Attempts are defined by law as crimes included in the completed offence.) Or suppose a person is charged with the crime of robbery by assaulting someone with intent to steal from him under what is currently section 343(c). Here assault is an element of one of the ways specified by statute of committing the greater crime of robbery. Therefore the person, if convicted of the crime of robbery, cannot later be tried for assault arising out of the same incident.

Recommendation 3(3) is in a sense the converse of Recommendation 3(2). In 3(2) a conviction, etc., for the greater crime precludes prosecution of the lesser crime. In contrast, 3(3) holds that a prosecution for the lesser included crime bars subsequent proceedings on the greater offence. Where circumstances arise in which the accused is charged with robbery, but has been previously convicted or acquitted of an assault that took place in the course of that robbery (i.e., an included offence), then the person should not be put on trial for the greater crime of robbery. To take another example, if previously convicted of theft, the accused should not be subsequently tried under section 348 of the *Code* for the charge of breaking and entering and committing the indictable crime of theft (assuming that the theft arose out of the same incident).

## RECOMMENDATION

Rule against Multiple Convictions

**4. (1) Where an accused is charged with more than one crime arising out of the same transaction, it should be possible to register a conviction against the accused for only one of the crimes charged, where:**

**(a) the other crimes are included in, or are specified by the statute as elements of alternative ways of committing, the crime upon which the conviction has been registered;**

**(b) the other crimes consist only of a conspiracy to commit the crime upon which the conviction has been registered;**

**(c) the other crimes are, in the circumstances, necessarily encompassed by the crime upon which the conviction has been registered;**

**(d) the other crimes are alternatives to the crime upon which the conviction has been registered;**

**(e) the crimes differ only in that the crime upon which the conviction has been registered is defined to prohibit a designated kind of conduct generally and the other crimes to prohibit specific instances of such conduct; or**

**(f) the crimes charged constitute a single, continuous course of conduct that the statute defines as a single, continuing crime.**

**(2) This rule should not apply when the statute expressly provides for a conviction to be registered for more than one crime, or, in the case of a continuing**

**course of conduct, where the law provides that specific periods of such conduct constitute separate crimes.**

Commentary

In *R.* v. *Prince*[178] the Supreme Court of Canada clarified the rule against multiple convictions, holding that for the rule to apply there must be both a factual nexus and a legal nexus between the charges.

The *sine qua non* for the operation of the rule against multiple convictions is that the offences must arise from the same transaction. Dickson C.J. explained:

> In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? ... Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined.... Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events ... and whether the accused's actions were related to each other by a common objective. In the meantime, it would be a mistake to emphasize the difficulties.[179]

The legal nexus is satisfied where there is no additional and distinguishing element in the crime charged for which the accused seeks to preclude conviction. The decision formulates a test that consolidates past Supreme Court decisions in this area of the law: it does not call into question those decisions.

Our proposal, which contrasts with the Supreme Court's approach, largely adopts the formulation of the rule against multiple convictions proposed in the American Law Institute's *Model Penal Code*.[180]

The introductory words to the recommendation build in a factual nexus requirement. In investigating whether the requisite factual nexus exists, the courts (at least since *Prince*) tend to ask whether the same act or acts of the accused have resulted in the charge. For example, in *R.* v. *Diggs* it was held that a charge of sexual assault involving non-consensual intercourse did not preclude a conviction for gross indecency based on an earlier act of fellatio.[181] Other cases develop distinctions based upon time intervals and other factual nuances in order to sustain the propriety of multiple

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178. *Supra*, note 42.

179. Ibid. at 492-93.

180. *Proposed Official Draft, supra*, note 159, subsec. 1.07(1) at 11. In the context of U.S. law on the rule against multiple convictions, it should be noted that the United States Supreme Court, in *Grady* v. *Corbin*, 109 L. Ed. 2d 548 (1990), has recently expanded the ambit of the rule.

181. (1987) 77 N.S.R. (2d) 432 (S.C.A.D.).

convictions.[182] Clearly, and the then Chief Justice acknowledges as much, the rule, precisely because it is so dependent upon individual facts and circumstances, is difficult to apply consistently. In some cases policy concerns may buttress a claim that multiple convictions ought not to be permitted, even for factually distinct events (such as are said to exist under s. 254(6) of the *Code*, which provides that in the context of a peace officer's demand to a motorist for a breath or blood sample to test for impairment, a person may only be convicted of one form of failure — for example, to comply with a demand respecting a breath sample for a screening device test or a breathalyzer test — "in respect of the same transaction"). In the formulation of the rule, the difficulty respecting the factual nexus requirement is not completely overcome by referring to "same transaction" rather than "same act", as the courts tend to do, but it does represent some improvement and hence we favour it in our recommendation.

The remainder of the recommendation sets out the legal nexus requirements concerning charges. Paragraph (a) prohibits a conviction both of a crime and, generally, an included crime. "Included crime" as used here is more fully defined in Recommendation 32. Paragraph (a) also applies to crimes that are specified by the statute as an element of an alternative way of committing the other crime. This is developed in Recommendation 33. For example, if a person was charged with both robbery and assault arising out of the same incident, this provision ensures that an assault conviction could not be entered after conviction on the charge of robbery.

Paragraph (b) prohibits a conviction for both conspiracy to commit a crime and the completed crime that was the sole object of the conspiracy. It represents a change in policy from existing law, which generally permits separate convictions for conspiracy to commit a crime and the actual commission of the crime.[183] (It does so largely on the ground that agreeing to commit the crime and later committing it are separate acts.) We propose this change to the present law on the ground that "[c]onspiracy is a type of inchoate crime, not entirely unlike attempt; ... the potential is comprehended by its actualization."[184] Our proposal is based on that recommended in the American Law Institute's *Model Penal Code*, which prohibits, under certain circumstances, a conviction for both a conspiracy and a completed crime that was the object of the conspiracy. The Comment to an earlier draft of the *Model Penal Code* explains:

> [C]onspiracy to commit an offense, like attempt, may consist merely of preparation to commit that offense.... This is not true, however, where the conspiracy had as its objective engaging in a course of criminal conduct. This involves a distinct danger additional to that involved in the actual commission of any specific offense. Therefore the limitation of the draft is confined to the situation where the completed offense was the sole criminal objective of the conspiracy. Therefore, there may be conviction of both a conspiracy and a completed offense committed pursuant to that conspiracy if

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182. See e.g., *R.* v. *Molloy* (1986), 1 W.C.B. (2d) 69 (B.C.C.A.), involving convictions for both trafficking in marijuana and possession of marijuana.

183. See *Sheppe* v. *The Queen*, *supra*, note 39.

184. See Klinck, *supra*, note 38 at 313.

the prosecution shows that the objective of the conspiracy was the commission of additional offenses.[185]

The following examples illustrate this proposal. Suppose that an accused is charged both with conspiracy to commit theft and the completed crime of theft. If convicted of the crime of theft, the accused cannot be convicted, on sufficient proof, of the redundant charge of conspiracy to commit the very theft in issue. However, suppose that the accused steals a car in order to more effectively carry out a conspiracy to traffic in narcotics and then commits the crime of trafficking in narcotics pursuant to the conspiracy. As the actual theft was committed in the furtherance of the conspiracy and involved a distinct danger additional to that involved in realizing the plan, a conviction on all charges (theft, conspiracy to traffic, and trafficking) should be allowed. This is consistent with Recommendation 4(6)(c) in *Recodifying Criminal Law*.[186]

Recommendation 4(1)(c) provides that the rule against multiple convictions applies when one crime is, in the circumstances, necessarily encompassed by the other crime. For example, suppose that a person is charged with dangerous driving causing death and impaired driving causing death. The act of the accused in driving while impaired in these circumstances necessarily encompasses the act of dangerous driving and so convictions on both cannot be maintained.[187]

Recommendation 4(1)(d) provides that the rule applies where the crime is alternative to the crime for which the accused was convicted. For example, this would preclude a conviction for driving while impaired and driving with a blood-alcohol concentration over .08 on the ground that the latter offence, being in effect a statutory deeming provision as to what constitutes impairment, is an alternative charge to the charge of impairment.

Recommendation 4(1)(e) prohibits conviction under both a general and more specific crime for the same conduct. For example, under the *Code* the crime of pointing a firearm is a particular instance of the crime of using a firearm, and so convictions for both crimes would be barred.

Recommendation 4(1)(f) deals with the situation in which there is a continuing crime. If the *Code* prohibits a continuing course of conduct, generally only one conviction should be possible.

Recommendation 4(2) is based on present case law. This issue has been specifically addressed in the context of gun-control legislation. Prior to the coming into force of

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185. *Tentative Draft No. 5, supra*, note 159, comment to para. 1.08(1)(b) at 32. For an explanation, see H. Wechsler, W.K. Jones and H.L. Korn, "Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy" (1961), 61 *Col. L. Rev.* 571; Note, "Conspiracy: Statutory Reform since the Model Penal Code" (1975), 75 *Col. L. Rev.* 1122.

186. See *supra*, note 3 at 47.

187. See *R.* v. *Colby* (1989), 52 C.C.C. (3d) 321 (Alta. C.A.).

the *Charter*, the Supreme Court ruled in *McGuigan* v. *The Queen*[188] that an accused could be convicted both of attempted theft while armed with an offensive weapon and of using a firearm. What was then subsection 83(2) of the *Code* [now s. 85(2)] provides that a sentence imposed for the crime of using a firearm is to be imposed consecutively to any other punishment imposed on the accused for a crime arising out of the same event or series of events. Dickson J., as he then was, for the majority of the Court, stated that this was a clear example of parliamentary intent to supplant the common law principle of the rule against multiple convictions. In *Krug* v. *The Queen*,[189] a post-*Charter* case, the Supreme Court addressed the issue again, but its approach was different. La Forest J. ruled that Parliament had in then section 83 created a new crime, distinct from that of attempted armed robbery, that precluded the application of the rule against multiple convictions in the first place. In any event, both cases reveal that where there is clear parliamentary intent to create separate crimes, the courts will hold that the rule against multiple convictions does not apply. The last part of Recommendation 4(2) is an exception to Recommendation 4(1)(f), and is added for clarity. It was proposed in the *Model Penal Code*. Where there is a continuing crime, a person violates the provision creating it only once, no matter how long such conduct continues, unless the statute prescribes that specific periods constitute separate crimes.[190]

## RECOMMENDATION

Inconsistent Judgments

**5. (1) A prosecution for a crime should be barred if a conviction or acquittal on a charge at a former trial necessarily required a determination of a factual or legal issue inconsistent with the determination of an identical issue that must be made in order for a conviction to be made on a different charge at a subsequent trial of the same accused.**

**(2) Recommendation 5(1) should not apply to a subsequent trial for perjury [perjury or making other false statements] if proof of the crime is made by calling additional evidence not available through the use of reasonable diligence at the time of the first trial.**

**(3) Nothing in these recommendations should be seen as preventing the courts from further developing the law on inconsistent judgments.**

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188. [1982] 1 S.C.R. 284.

189. *Supra*, note 41.

190. *Proposed Official Draft, supra*, note 159, para. 1.07(1)(e) at 11.

Commentary

This recommendation attempts to clearly state the rule against the rendering of inconsistent judgments, or "issue estoppel." As noted earlier, the doctrine asserts that an issue determined in favour of the accused by a valid and final judgment cannot be litigated between the same parties in any future prosecution.

The recommendation deals only with "cause of action" estoppel, i.e., where a prior determination of an issue in an earlier criminal trial would necessarily be inconsistent with a determination on the same issue at a subsequent trial of the accused on a different charge. However, apparent inconsistency of jury verdicts within the same proceedings continues to be permitted, subject to the limitations set down in the case law. Arguably, a recent example of apparent inconsistency of jury verdicts is the *Charles Yacoub* case, where the accused, who hijacked a bus and forced the driver to drive it to Parliament Hill in April 1989, was acquitted of the more serious charges, such as hostage-taking, but convicted only of the lesser charges, such as forcible detention. Juries may permit extra-legal factors to enter into their decisions — e.g., disapproval of police tactics, or a concern that the law is too harsh — or may, in the circumstances, render verdicts that in their view are entirely consistent.[191] Subsection (3) recognizes that other aspects of issue estoppel can be developed by the courts.

Subsection (2) addresses the effect of issue estoppel where the issue is originally decided upon in favour of the accused by reason of perjury. The proposal adopted here is that advocated by Lamer J. (as he then was) and approved by a majority of Supreme Court justices in *Grdic* v. *The Queen*.[192] Lamer J. recognized a power to prosecute a person for committing a fraud (e.g., perjury) on the court, subject to two limitations. First, the prosecutor cannot merely tender the same evidence as was used at the former trial. To allow the tendering of such evidence simply relitigates the issue. This should not be allowed because it effectively impeaches the former trial without providing any new basis on which to do so. To avoid this, additional evidence must be tendered. However, additional evidence is of two kinds: it may be evidence available at the time of the former trial but not put before the court, or it may be evidence not available at the time of the former trial. This leads to our second limitation. To prove the perjury charge, the prosecutor cannot use evidence that was known to be or should have been known to be available at the time of the first trial. Barring such evidence promotes fairness to the accused, who was at the first trial in jeopardy of answering the prosecutor's full case. Thus, under our proposal the charge of perjury must be proved by calling additional evidence that the prosecutor could not have obtained and used at the first trial had he exercised due diligence. That part of the recommendation in square brackets, i.e., "perjury or making other false statements", reflects our proposals for

191. Friedland, *supra*, note 1 at 141-42.

192. *Supra*, note 53.

reform of the present law on perjury and making contradictory statements, outlined in Report 31 on *Recodifying Criminal Law*.[193]

## RECOMMENDATION

Effect of Foreign Judgments

**6. (1) Where a person is charged in Canada with the same or a substantially similar crime for which the person was acquitted or convicted by a court of competent jurisdiction in a foreign state, the foreign acquittal or conviction should have the same effect as a judgment in Canada if:**

**(a) the foreign state took jurisdiction over the crime and the accused on the same or similar basis as could have been exercised by Canada; or**

**(b) Canada acquiesced in the claim by the other state to jurisdiction.**

**(2) For purposes of subsection (1), where a person has been convicted in his absence by a court outside Canada and was not, because of such absence, in peril of suffering any punishment that the court has ordered or may order, the court in Canada should have the power to disregard that conviction and proceed with the trial in Canada.**

**(3) A foreign conviction should not include a judgment made in the absence of the accused that would be annulled upon the return of the accused so that a trial on the charge could then proceed.**

Commentary

Protection against double jeopardy has not only national but international application. This recommendation sets out those occasions when a foreign conviction or acquittal will bar a subsequent prosecution in Canada. Recommendation 6(1) adopts the ''double criminality'' rule: the conduct must be a crime in both the foreign country and in Canada. That the crimes must be the same as or substantially similar to each other recognizes that in these situations the crime of which the accused is acquitted or convicted in the foreign jurisdiction will rarely be precisely the same as that with which the accused is charged in Canada. As Professor La Forest, now La Forest J., states in *Extradition to and from Canada*:

> [A]n exact correspondence between offences in two countries cannot be expected. It is, therefore, not necessary that the crime concerned bears the same name in both countries. It is sufficient if the acts constituting the offence in the demanding state

193. In essence, Report 31 creates the specific-purpose crimes of making a false solemn statement in a public proceeding (perjury) or outside a public proceeding (other false statements). The definition of ''false solemn statement'' includes a solemn statement that contradicts a prior solemn statement. Thus, the crime of giving contradictory evidence is, by our proposals, amalgamated with the crimes of perjury or making other false statements. See Report 31, *supra*, note 3 at 111, ss. 107-109 at 200.

> also amount to a crime in the country from which the fugitive is sought to be extradited even though it may be called by a different name.... [I]t is the essence of the offence that is important.[194]

Recommendation 6(1)(a) sets out the general rule governing jurisdiction. Essentially, if the foreign state asserts jurisdiction on the same or a similar basis as in Canada, then a judgment rendered on that assertion of jurisdiction will be recognized in Canada. The jurisdictional basis asserted by Canada in relation to crimes is set out in Report 31 on *Recodifying Criminal Law*.[195] Although based largely on the territorial principle (a state has jurisdiction over a crime committed on its territory), this jurisdictional basis is sometimes based on other principles. For example, the protective principle (a state has jurisdiction to try anyone for acts committed outside its territory in order to protect its own security) applies to allow the court to try persons who anywhere commit crimes against Canadian currency or passports. And the universality principle (a state has jurisdiction to try anyone who anywhere commits certain universally recognized crimes) applies to allow the court to try persons who commit piracy.[196]

Recommendation 6(1)(b) is largely a codification of the decision in the English case of *R.* v. *Aughet*.[197] England waived jurisdiction to try the accused for wounding another person even though the accused had committed the crime in England, and permitted Belgian authorities to court-martial him. After his acquittal at the court-martial he could not later be tried in England. In similar situations, a decision by Canada to waive its valid jurisdiction over an accused so that he can be tried by a foreign court should bind Canada to the decision made by the foreign court.

Recommendation 6(2) deals with situations in which the accused was not present in court but was nonetheless convicted of the charge against him. What effect does such a conviction have if the sentence cannot be carried out because the person has fled to another country? The *Criminal Code* only partially answers this question. Subsection 607(6) provides that for certain crimes, such as crimes against humanity or war crimes, a person who has been tried and convicted outside Canada may not plead *autrefois convict* with respect to a count that charges an offence if (a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission. This is understandable in the context of war crimes, where the earlier trial of an accused in a foreign country has sometimes taken place after the accused has fled the country. However, there is no codified rule that applies to all crimes.

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194. G.V. La Forest, *Extradition to and from Canada*, 2d ed. (Toronto: Canada Law Book, 1977) at 54-55.

195. *Supra*, note 3 at 49-53.

196. Ibid., clause 5 at 49-53. For a discussion of the principles that allow a state to have jurisdiction over criminal activity, see LRC, *Extraterritorial Jurisdiction*, Working Paper 37 (Ottawa: Supply and Services Canada, 1984) at 8-10.

197. (1918) 13 C. App. R. 101.

Accordingly, we propose that subsection 607(6) be replaced by the more general rule set out in Recommendation 6(2). It is modeled on a proposal made by the English Law Commission in its recent *Report and Draft Criminal Code Bill*.[198]

This rule has certain advantages over the present law. First, it codifies a rule that applies to all crimes. Second, it sets out a rationale for the rule: the accused must be at risk of suffering punishment as a result of the earlier conviction. What does "risk" of suffering punishment mean? One factor, we would suggest, could well be whether Canada intended to extradite the accused to another country. If extradition or other legal means of compelling the accused to go back to the other country are highly improbable in the circumstances, then the accused cannot be said to be at risk of punishment because, absent carelessness on his part, he will never be punished in the other country.

A good example of a trial in absentia affecting a subsequent plea of *autrefois convict* is the English case of *R.* v. *Thomas*.[199] The accused had been convicted of fraud by an Italian court in his absence. Later he was tried in England for theft and forgery arising out of the same conduct. The Court of Appeal held that on these facts the plea of *autrefois convict* could not succeed because the accused was not in peril of being punished for the crime for which he was convicted in Italy.

The purpose of Recommendation 6(3) is to ensure that the effect of a condemnation by reason of contumacy in another state is unchanged. The definition set out here is based on that put forth in one of the first English cases to discuss a condemnation by reason of contumacy, *Re Coppin*.[200] Such a procedure is permitted in some foreign jurisdictions (for example, France[201]). In effect, these judgments are "declaratory judgments in the accused's absence; on his return he will be put on trial as if he had never been absent."[202] Indeed, extradition statutes often expressly provide that a person who is condemned by reason of contumacy is to be treated, not as a person convicted of a crime, but as an accused.[203]

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198. The Law Commission, *supra*, note 167, subsec. 11(4)(6) at 49.

199. *Supra*, note 66.

200. (1866) L.R. 2 Ch. App. 47 at 53, where the court quoted from an expert on French law:

> If a man is accused of forgery in *France*, and a judgment *par contumace* is obtained against him, it would be a sentence of the Court without the assistance of a jury. If that man is arrested or surrenders himself, that judgment is annulled, so that it is exactly the same as if no proceedings had been taken against him, and then he undergoes his trial for the offence with which he was charged.

201. See *The French Code of Criminal Procedure, Revised*, trans. G.L. Kock and R.S. Frase (Littleton, Colo.: Fred B. Rothman, 1988) articles 627-641 at 271-74.

202. La Forest, *supra*, note 194 at 112.

203. See, e.g., *Extradition Act*, R.S.C. 1985, c. E-23, s. 2, which provides that:

> "conviction" or "convicted" does not include the case of a condemnation under foreign law by reason of contumacy, but "accused person" includes a person as condemned.

**RECOMMENDATION**

Application of Rules against Double Jeopardy to Federal Offences

**7. Where an act or omission is punishable under more than one Act of Parliament, and unless a contrary intention appears, the offender could be subject to proceedings under any of those Acts, but should not be liable to be punished more than once for that act or omission.**

Commentary

This recommendation, modeled on section 12 of the *Criminal Code*, is meant to ensure that the protection against double jeopardy offered by the previous recommendations apply in all proceedings over which the federal government has jurisdiction. It therefore applies not only to crimes but also to regulatory offences. However, it does not seek to extend its coverage to situations involving the dual prosecution of federal crimes and provincial offences. To do so could conceivably be viewed as an unwarranted extension of the Commission's mandate, which is restricted to the reform of federal laws only. Such rules can in any event be developed, as they now are, by evolving jurisprudence under the common law and the *Charter*.[204]

**RECOMMENDATION**

Abuse of Process

**8. Nothing in this Part should limit the power of a court to stay any proceedings on the ground that they constitute an abuse of the process of the court.**

Commentary

While not strictly necessary, this recommendation ensures that the court's power to stay a proceeding on the ground of abuse of process continues, without being limited in any way by these recommendations. This power has recently been recognized by the Supreme Court of Canada as preventing conviction for a crime when the accused has

204. For a discussion of the availability of double jeopardy concepts to conduct giving rise to both federal and provincial prosecutions, see *supra* at 19.

been entrapped by police.[205] In our view, such a power could also be applied by the courts where subsequent prosecutions in violation of the protection against double jeopardy constitute an abuse of process. A similar provision was proposed by the English Law Commission.[206]

## B. Procedural Matters

**RECOMMENDATION**

Double Jeopardy Issues May Be Raised in Pre-Trial or Trial Motions

**9. (1) Challenges to the validity of criminal proceedings involving double jeopardy should be capable of being raised either by way of pre-trial motion or as trial motions.**

**(2) Any issue involving double jeopardy may, in the discretion of the trial court, be disposed of before or after plea is entered.**

Commentary

A major concern of the courts has been to ensure that double jeopardy issues are raised in a manner that does not create delay and inefficiency. This concern was raised most noticeably in the decision of the Supreme Court of Canada in *R.* v. *Prince*.[207] There, the Court disapproved of the use of an interlocutory application for a prerogative remedy as a means of reviewing the trial judge's decision as to whether or not the rule against multiple convictions applied.

We believe that double jeopardy issues should be raised as soon as practicable in the criminal process. The best way of achieving this goal is, tentatively, by an expanded use of pre-trial motions, as will be discussed more fully in our forthcoming Working Paper on *Trial within a Reasonable Time*.

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205. See *Amato* v. *The Queen*, [1982] 2 S.C.R. 418; *R.* v. *Jewitt*, [1985] 2 S.C.R. 128; and *R.* v. *Mack*, [1988] 2 S.C.R. 903, in which the defence of entrapment and the remedy of a stay of proceedings for abuse of process where entrapment is proved are examined by the Supreme Court.

206. See The Law Commission, *supra*, note 167, subsec. 11(7) at 49.

207. *Supra*, note 42.

In that document we consider proposing changes to the present law that would expand upon the ability of both the prosecution and defence to bring pre-trial motions. Pre-trial motions are tentatively defined as motions that can conveniently be disposed of in advance of the trial and in the absence of the jury (where the trial involves a jury) and the resolution of which does not depend upon the evidence to be heard or developed in the case proper. These motions would include double jeopardy issues. Under the scheme, the determination of any matter at a pre-trial motion should be considered as, and have the effect of, a determination made at trial. A pre-trial motions judge who is of the opinion that he lacks sufficient information to decide the motion would be able to defer it to trial. Pre-trial motions may be brought any time between the laying of the charge and the commencement of trial, but not while the preliminary inquiry is in progress. Decisions on pre-trial motions would not be reviewable except as provided in the procedures set out in our forthcoming Working Paper on *Extraordinary Remedies*. If the matter is not raised by means of a pre-trial motion, the accused may of course raise it at trial.

Whether or not it would be appropriate under Recommendation 9(1) for a double jeopardy issue to be resolved by way of pre-trial motion or at the trial itself will depend on the particular issue and, where applicable, the circumstances surrounding that issue. For example, if the double jeopardy issue involves a previous acquittal or conviction for the same or substantially the same crime, the issue could be determined early in the process by way of pre-trial motion. However, if the double jeopardy issue is whether the rule against multiple convictions applies, it is more likely that it would be raised before the trial judge on motion at trial, because the judge must first hear evidence to decide whether the accused is guilty on the charges before deciding whether the rule against multiple convictions applies.

Our scheme for the review of pre-trial motions will also seek to avoid the problem of delay caused by the use of an interlocutory application to pursue a prerogative remedy in order to review a judge's decision that a double jeopardy application of some sort should be denied and that the trial should proceed. Once a pre-trial motions judge decides the issue against the applicant, as a general rule the decision would not be reviewable until after the trial.

Recommendation 9(2) sets out when an accused may raise a double jeopardy issue at trial. Clearly, the accused should not be barred from raising a double jeopardy issue at trial. However, again depending on the nature of the double jeopardy issue, the best time for raising it will depend upon the circumstances, and the question of the appropriate time to determine the double jeopardy issue is accordingly left to the discretion of the trial judge.

**RECOMMENDATION**

Effect of Pre-Trial or Trial Motions on Double Jeopardy Issues

**10. Where double jeopardy issues are decided in favour of the accused, the court, subject to Recommendation 12, should terminate the prosecution on the relevant charge by means of a termination order.**

Commentary

This recommendation tentatively sets out the effect of a successful motion based on double jeopardy. The prosecution is to be terminated unless the issue involves the application of the rule against multiple convictions, in which case Recommendation 12 applies. This remedy will be considered in our forthcoming Working Paper on *Remedies in Criminal Proceedings* as a mechanism by means of which criminal proceedings may be unequivocally terminated.

**RECOMMENDATION**

Evidentiary Matters to Determine Whether the Person Has Been Previously Acquitted or Convicted of the Same Crime

**11. Where a double jeopardy issue under Recommendation 3 is being tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court on the charge that is pending before that court, should be admissible in evidence to prove or to disprove the identity of the charges.**

Commentary

This recommendation incorporates section 608 of the *Code*, which requires the admission of certain evidence of the former trial to ensure the similarity of the charges in respect of these pleas and sets out the procedure by which that evidence is to be obtained.

**RECOMMENDATION**

Effect on Verdicts When the Rule against Multiple Convictions Applies

**12. (1) Where an accused pleads not guilty to more than one crime arising out of the same transaction and where the rule against multiple convictions applies, the accused:**

**(a) if acquitted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should be convicted of the crime equal or closest to it in terms of gravity or seriousness; or**

**(b) if convicted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should have a verdict of conviction pronounced, but not entered, on the other crimes, and a conditional stay should be entered in relation to those crimes.**

**(2) If the accused, having been charged with more than one crime, pleads guilty to a crime charged other than the one the prosecution wishes to prosecute, the plea should be held in abeyance until a verdict on the prosecution's charge has been pronounced and, if the rule against multiple convictions applies, the accused:**

**(a) if acquitted of the crime for which the prosecution seeks a conviction, should be convicted of the crime for which the accused pleaded guilty; or**

**(b) if convicted of the crime for which the prosecution seeks a conviction, should have a verdict of conviction pronounced, but not entered, against him or her for the crime in relation to which the plea of guilty was entered, and a conditional stay should be entered in relation to such crime.**

Commentary

This proposal codifies recent Supreme Court of Canada decisions that clarify the present procedure for the rendering of verdicts and the entering or registering of convictions where the accused is in jeopardy of conviction for more than one crime charged and where the rule against multiple convictions applies.[208] Subsection (1) deals with the case where the accused pleads not guilty to all the crimes charged against him and arising out of the same transaction. Subsection (2) deals with the case where the accused wants to plead guilty to a crime other than the one that the prosecutor primarily wishes to pursue. The proposal ensures that when an accused is convicted of a crime in these circumstances there is no acquittal entered for the other crimes arising out of the same transaction in relation to which the rule against multiple convictions applies. The trial judge should determine whether or not the accused is guilty of committing these crimes. The judge, determining that the accused is guilty, should pronounce him guilty of those crimes, but instead of entering an acquittal in relation to those crimes, the judge should enter a conditional stay. The stay would be conditional on the ultimate confirmation of the verdict on the charge pursued by the prosecutor. If the conviction is not appealed or is upheld on appeal, the stay on the other charge becomes permanent. If the conviction is overturned on appeal, the conditional stay on the other charge dissolves and a conviction on it may be entered. As noted earlier, this concept of a conditional stay accords better with the policy reasons preventing the entering of a conviction on the charge. The accused has not been acquitted of that crime: after all, the trial judge has determined that the accused is guilty. However, fairness and the

208. See, e.g., *R.* v. *Provo*, *supra*, note 79.

integrity of the criminal justice system demand that a second conviction not be entered. A conditional stay better reflects this policy.

The wording of this proposal expands upon the way this rule is usually explained by the courts, which speak in terms of a conviction being entered on the more serious crime and a stay being entered on the lesser crime. It centers on the issue that an accused should not be able to take advantage of the rule against multiple convictions to avoid punishment on the more serious charge. However, it is not always the case that the charges to which the rule applies will involve different levels of punishment. For example, under section 253 of the present *Code*, a person can be charged with operating a motor vehicle while impaired or while having over .08 concentration of alcohol in the blood. Under section 255, both charges carry the same punishment and are thus of equal gravity, yet the rule against multiple convictions precludes convictions on both. Our recommendation takes this into account.

## II. Pleas

### A. General Matters

**RECOMMENDATION**

Codification of Pleas

**13. Only those pleas expressly set out in the proposed Code of Criminal Procedure (LRC) should be recognized.**

Commentary

Since a Code of Criminal Procedure should be self-contained, the only pleas permitted should be those to which the Code specifically refers. This proposal ensures that our Code, by failing to mention them, does not permit those other special pleas allowed at common law — e.g., the plea to jurisdiction, the plea in abatement or a demurrer, the special plea of *nolo contendere*, which is often permitted in the United States, the present plea of justification in relation to the crime of defamatory libel, and conditional pleas.

Why should the Code not allow such pleas? First, the pleas relating to jurisdiction, abatement, and demurrer are now regarded as obsolete.[209] Other means are available to accomplish what these pleas were meant to accomplish. For example, jurisdictional

209. J.F. Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 43rd ed. (London: Sweet & Maxwell, 1988) at 349. The pleas relating to jurisdiction, abatement, and demurrer are more fully discussed *supra* at 25.

issues or procedural irregularities that would have given rise to such pleas in an earlier era can be resolved by means of a pre-trial motion rather than by a special plea.

Second, should Canadian law adopt a plea of "no contest" or *nolo contendere*? If we are to answer this question, the characteristics of the plea itself need to be set out. A plea of *nolo contendere* is, for the purpose of the case, the full equivalent of a plea of guilty. But there is no one description of what the plea is.

> [T]he plea has been variously described as a quasi confession of guilt, a confession, an implied confession, a plea of guilty substantially, though not technically, a substitute for a plea of guilty, a query directed to the court to decide the defendant's guilt and a plea of guilty in Latin....
>
> In an increasing number of cases the position has been taken that the plea is not a plea at all within the ordinary meaning of the word but is rather an appeal for mercy or the expression of unwillingness to plead and present a defense.[210]

Moreover, this plea is unlike a plea of guilty in other ways. Unlike a guilty plea, which may be entered on all crimes by the accused as a matter of right, in the U.S. the general acceptance of the plea of *nolo contendere* is not available in relation to all crimes. Also, as already noted, unlike the plea of guilty, this plea cannot be used against the defendant as an admission in any civil or subsequent criminal proceeding for the same act.[211] U.S. commentators have argued that this plea is useful in the prosecution of particular kinds of crimes (e.g., anti-trust prosecutions) because it dispenses with the need for lengthy trials primarily to any subsequent civil proceedings.[212]

Also, in the U.S. an expectation has grown up that when a court accepts the plea it is morally bound to impose a lighter sentence than it would impose on a plea of guilty. Furthermore, there exists the feeling that with a plea of *nolo contendere* the stigma that attaches to a plea of guilty can be avoided. Finally, there is an impression that the plea, "if it does not transform the nature of the proceedings from criminal to civil, moves it at least in this direction. Since the plea frequently is the result of a compromise between the defendant and the state, the impression is created that the two parties occupy the position of equals and not of prosecutor and defendant."[213]

These practical consequences of the plea, together with its theoretical aspects, give rise to serious misgivings concerning its ultimate utility.

> Since an accused is either guilty of the offense charged or not guilty, there seems to be, logically speaking, no room for a plea "in between". It is, of course, easy to understand why a person guilty of an offense should prefer to plead nolo contendere instead of pleading guilty, thus avoiding being estopped from denying the facts to which he interposed the plea in a subsequent civil proceeding. But obviously, the fact

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210. Annotation, "Plea of Nolo Contendere or Non Vult Contendere" (1963), 89 A.L.R. 2d 540 at 547.

211. Ibid. at 554.

212. N.B. Lenvin and E.S. Meyers, "Nolo Contendere: Its Nature and Implications" (1941-42), 51 *Yale L.J.* 1255 at 1268.

213. Annotation, "Plea of Nolo Contendere or Non Vult Contendere" (1944), 152 A.L.R. 253 at 294-95.

that the plea has certain advantages for the guilty law-breaker is not a sufficient justification for its existence.

> It can even be perceived why under certain rather exceptional circumstances a person innocent of the offense charged should prefer the plea of nolo contendere to a plea of not guilty, and the courts occasionally give hints as to such circumstances. Such possible motivations have been said to be: to save expense and avoid notoriety; to avoid unpleasant publicity; to avoid a hostile jury; and to waive contest obviously hopeless because of lack of witnesses. These considerations do not seem to be very compelling or worthy of protection in view of the fact that the public at large has as much interest in the conviction of the guilty as in the acquittal of the innocent. Because of its doubtful usefulness, the plea has been abolished by statute in some jurisdictions, while in others it has practically disappeared by this use. It enjoyed a partial revival during the prohibition era, when it was pleaded to charges of violations of the liquor law, and it is applied with increasing frequency in anti-trust prosecutions. Only if it can be shown that the plea of nolo contendere serves a real and useful function in the administration of justice, can its continued use be considered as justified.[214]

Given these not insignificant defects, what would be the advantage of creating a plea of *nolo contendere*? The only justification is that it would avoid the unnecessary cost of criminal trials in those situations where an accused goes to trial only to avoid the implications of a guilty plea in subsequent civil proceedings. However, this is a circuitous way of addressing the basic issue of whether a guilty plea should be admissible in civil or criminal proceedings. We do not resolve this issue here, but will address it squarely in future work on evidentiary issues in the criminal trial process. However this issue is resolved, we believe that the plea of *nolo contendere* would not fulfil a useful function in the administration of the Canadian criminal justice system.

Third, what is the utility of the plea of justification permitted in defamatory libel prosecutions? We explicitly recommended the abolition of the crime of defamatory libel in Working Paper 35, *Defamatory Libel*, and implicitly in Report 31, *Recodifying Criminal Law*. Accordingly, the special plea of justification in relation to this crime should be abolished.

Finally, we reject the use of a conditional plea of guilty and even a plea of guilty with an explanation. This would alter existing law, which appears to permit a plea of guilty with an explanation so long as it is unequivocal as to guilt. Explanations are more properly matters going to sentence and should be raised at that stage. This ensures that a plea of guilty clearly constitutes an admission of all the elements of the crime. It also prevents the possibility of delays produced as a result of further proceedings to determine whether the acceptance of a conditional plea of guilty with an explanation amounted in the circumstances to an equivocal plea of guilty.

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214. Ibid. at 295.

**RECOMMENDATION**

Plea of Not Guilty or Guilty

**14. An accused who is called upon to plead to a crime charged should plead not guilty or guilty.**

Commentary

This proposal incorporates subsection 606(1) of the *Code* with one major exception. There is no longer any reference to the special pleas in bar authorized by the *Code*, such as *autrefois acquit*, *autrefois convict*, and pardon. As explained in our discussion of Recommendations 9 and 10, this is because our scheme proposes that all double jeopardy issues may be raised by means of pre-trial or trial motions. Thus, there would no longer be any need to refer to special pleas that protect against double jeopardy.

**RECOMMENDATION**

Defences under the Plea of Not Guilty

**15. Any defence set out in the proposed Criminal Code (LRC) should be permitted to be relied upon under the plea of not guilty.**

Commentary

This is a modified form of section 613 of the present *Code*, absent its reference to special pleas. (As already noted in the previous paragraph, our proposed scheme would not admit of special pleas.) Since the plea of not guilty denies every fact or element essential to guilt, it is only logical that, pursuant to it, the accused be permitted to raise any possible defence. This means that, if Parliament should decide to retain a crime of defamation, the defence of truth should be raised just as any other defence to a crime, and not by means of a special plea.

## B. Procedural Matters

**RECOMMENDATION**

Who Appears

**16. (1) Where the crime charged is punishable by more than two years' imprisonment, the accused should appear in court in person or, where the**

**accused, the court and the prosecutor consent, in writing or by telephone or other means of communication.**

**(2) Where the crime charged is punishable by two years' imprisonment or less, the accused, without having to obtain prior consent, should be allowed to appear in person, by counsel or agent, in writing, or by telephone or other means of communication, unless the court requires the accused to appear in person.**

**(3) If the accused is a corporation, the corporation should appear by counsel or agent for the corporation, and**

**(a) where the crime is punishable by more than two years' imprisonment, counsel or agent should appear in court in person or, where counsel or agent, the court and the prosecution consent, in writing, or by telephone or other means of communication; or**

**(b) where the crime charged is punishable by two years' imprisonment or less, counsel or agent, without the need to obtain prior consent, should be allowed to appear in person, in writing, or by telephone or other means of communication;**

**unless the court requires the counsel or agent to appear in person.**

Commentary

Under existing law, in general the accused must personally attend court to plead to an indictable offence. However, for summary conviction offences, the *Code* specifically provides that the accused need not be personally present to plead. Counsel or agent may do so on behalf of the accused, although the court may require the accused to appear personally. Moreover, because a corporation is an artificial entity, the *Code* provides that a counsel or agent for the corporation may appear and plead for it.

As noted, the present law is somewhat ambiguous about the extent to which appearance to plead may be made by modern means of telecommunication. In *R.* v. *Bardell*[215] it was held that appearing and pleading by telephone in regard to summary conviction matters was not allowed. Yet in *R.* v. *Fecteau*[216] the court indicated *obiter* that an accused could appear and plead by television provided that it was clear that the accused waived his right to be physically present in court. And, also as noted, recently in Quebec an accused who was already in jail pleaded guilty by telephone to charges in the United States.

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215. *Supra*, note 96.

216. *Supra*, note 97.

The law requires clarification. In our view, the appropriate policy is to allow resort to modern technological aids in this area of the law provided that adequate safeguards for the accused and the courts exist.

This recommendation would remove existing requirements pertaining to the physical presence in court of an accused or, in some cases, even of counsel or agent for the accused. The proposal has been cast in terms of the recommendations contained in Working Paper 54, *Classification of Offences* that seek to eliminate the present distinction between indictable and summary offences. The Paper employs a scheme that classifies crimes in terms of those punishable by more than two years' imprisonment and those punishable by two years' imprisonment or less.[217] The rules proposed here for crimes punishable by more than two years' imprisonment permit an accused, upon obtaining the consent of the prosecutor and the court, to appear in writing or by telephone or other means of communication. The rule for crimes punishable by two years' imprisonment or less allows counsel or agent of an accused to appear on behalf of an accused, and adds flexibility to the present law by permitting an accused to appear in writing or by telephone or other means of communication. Recommendation 16(3) adapts the present *Code* requirement that a corporation appear by counsel or agent and, again, would permit counsel or agent to appear by means other than being physically present in court.

## RECOMMENDATION

Failure to Appear at a Scheduled Appearance

**17. (1) Where an accused is charged with a crime punishable by more than two years' imprisonment and fails to appear on a scheduled appearance date other than for trial, the court should adjourn the matter and may compel the appearance of the accused by the issuance of a warrant.**

**(2) Where an accused is charged with a crime punishable by two years' imprisonment or less and fails to appear on a scheduled appearance date other than for trial, the court may proceed to fix a date for trial or may adjourn the matter, and may compel the appearance of the accused by the issuance of a warrant.**

Commentary

There are several ways in which an accused who is at liberty can be required to appear in court for the first time on a charge. He may be given an appearance notice by the police on the spot, which notice contains a requirement that the accused appear in court at a specified time, date and place. Or, after the laying of an information

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217. LRC, *Classification of Offences*, Working Paper 54 (Ottawa: The Commission, 1986) at 35-40.

before a justice, the police may have a summons issued to an accused that contains a similar requirement, or they may arrest an accused pursuant to a warrant and take him to a justice (usually within a twenty-four hour period) who may then release him on bail on the understanding that the accused will subsequently attend court at a specified time. When an accused is required to appear and plead is set out in Recommendation 20. What happens when an accused fails to appear at, or absconds during, trial is set out in Recommendation 23. Recommendation 17 addresses what happens if the accused fails to appear at the specified time, date and place set out in the appearance notice or summons. The policy set out here distinguishes between crimes punishable by more than two years' imprisonment and crimes punishable by two years' imprisonment or less. As noted earlier, this demarcation reflects the proposed classification scheme described in our *Classification of Offences* Working Paper. The structure of the recommendation is based on the policy that, for the more serious category of crimes, an accused should be physically present before the court on such appearance dates. However, for the less serious category of crimes, the accused (consistent with current practice) need not be present. The policy pursued here holds that for minor crimes the court should have a greater power to act in the absence of the accused than would be the case when a more serious allegation is involved. Recommendation 17(1) requires that if an accused has been charged with a crime punishable by more than two years' imprisonment and fails to attend as required, the court must adjourn the matter. Recommendation 17(2) stipulates that if an accused has been charged with a crime punishable by two years' imprisonment or less, the justice may, in the exercise of his discretion, act in the absence of the accused and set a date for trial or adjourn the proceedings. In all these cases the accused may be compelled to attend at future proceedings by means of an arrest warrant, but this is not mandatory. For example, if it appears that the accused was absent due to illness, the issuance of a warrant obviously should not be required. However, if there is some indication that the accused purposely failed to appear, it is likely that a warrant would be issued to compel the attendance of the accused. This aspect of the recommendation is based on our recommendation for the issuance of bench warrants set out in our Working Paper on *Compelling Appearance, Interim Release and Pre-trial Detention*.[218]

## RECOMMENDATION

Reading the Charge

**18. (1) When an accused appears in court to plead to the charge, the accused should be called and the substance of the charge should be read.**

**(2) Where there is more than one count in an information or indictment [charge document], each count should be read separately to the accused.**

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218. LRC, *Compelling Appearance, Interim Release and Pre-trial Detention*, Working Paper 57 (Ottawa: The Commission, 1988) rec. 39 at 75.

**(3) Where the accused appears by counsel or agent because the accused is not present or is a corporation, the substance of each charge should be read to the counsel or agent.**

**(4) The accused or counsel or agent of the accused should be permitted to waive the reading of the charge, and in its stead the court, when asking the accused or counsel or agent of the accused to plead, should state the general nature of the charge in summary form.**

**(5) Any waiver of the reading of charges should be informed.**

Commentary

As noted earlier, an accused must be arraigned before pleading to a charge. However, arraignment is a term that, arguably, means little to those not familiar with the legal process. This recommendation, and the two that immediately follow, speak plainly about the events that constitute the arraignment process: calling the accused before the bar of the court, reading the charge to the accused, and asking for the plea.

This proposal outlines the precise procedure for reading the charge. Subsection (1) incorporates part of the wording of subsection 801(1) of the *Code* for summary conviction offences; it requires that "[w]here the defendant appears for the trial, *the substance of the information* laid against him shall be stated to him, and he shall be asked ... whether he pleads guilty or not guilty to the information...." (emphasis added). Subsection (2) incorporates the practice set out in *R.* v. *Boyle*,[219] whereby each count must be read separately to the accused and pleaded to separately by the accused. The bracketed term "charge document" reflects our proposal in Working Paper 55, *The Charge Document in Criminal Cases*, that a single document, a "charge document", be used in criminal proceedings instead of an "information" or "indictment."[220] Subsection (3) applies the same procedure to those circumstances in which the accused is not present or is incorporated and is represented by counsel or agent.

Subsections (4) and (5) set out the circumstances in which the accused (or the counsel or agent of the accused, where the accused is not present or is a corporation) may waive the formal reading of the charge. They permit such a waiver so long as it is informed, in the sense that it must be clear and unequivocal that the accused is waiving a procedural safeguard and is doing so with full knowledge of the right the procedure was enacted to protect and of the effect the waiver will have on that right in the process. This is consistent with the law on waiver developed in *Korponay* v. *Attorney General of Canada*.[221] In the event of a waiver the court must nevertheless summarize

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219. *Supra*, note 104.

220. *Supra*, note 139 at 15-16.

221. [1982] 1 S.C.R. 41.

the charge, thereby ensuring not only that the accused is aware of the nature of the charge, but also that the public is advised of it.

## RECOMMENDATION

Who Pleads

**19. (1) Where the crime charged is punishable by more than two years' imprisonment, the accused should plead personally.**

**(2) Where the crime charged is punishable by two years' imprisonment or less, the accused should be permitted to plead personally or by counsel or agent, unless the court requires the accused to plead personally.**

**(3) Where the accused is a corporation, the plea should be entered by counsel or agent for the corporation.**

Commentary

This recommendation sets out who pleads to the charge. As already noted, under current law an accused may personally plead, counsel may enter a plea on behalf of the accused who is present in court, in summary conviction cases counsel or agent for the accused may appear instead and plead and, if the accused is a corporation, counsel or agent must appear and plead on behalf of the corporation.[222]

Existing law on pleading raises one major issue. Is it preferable to continue the rule that permits counsel to enter a plea on behalf of the accused who is present in court? Or is it preferable to require the accused to enter the plea personally?

Subsection (1) marks a major departure from the present law by generally requiring that the accused plead personally to the charge where the charge is serious. The reasoning behind this proposal is twofold. First, charges of criminal activity are accusations of serious violations of the fundamental values of society. If found guilty, the accused may be punished by a jail term. The plea must therefore be made in circumstances that best ensure that it is made knowingly and voluntarily. The best means to ensure this is by way of a personal plea by the accused rather than by counsel's pleading on behalf of the accused. This is currently the situation in England.[223] Second, the requirement of a personal plea better complements Recommendation 21, which in some cases imposes a degree of judicial supervision over accepting a guilty plea by requiring the judge to ask the accused personally about his understanding of the effect of the plea. (The rationale is that personal communication

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222. For a discussion of the present law in this area, see *supra* at 27-28.

223. See *R.* v. *Ellis* (1973), 57 Cr. App. R. 571.

from the accused to the court and the court to the accused creates better understanding than does communication through intermediaries.)

At the same time, however, subsections (2) and (3) promote a degree of flexibility for crimes punishable by two years' or less imprisonment, as proposed in our Working Paper 54 on *Classification of Offences*, or where the accused is a corporation (and therefore an artificial person). In these cases, the counsel or agent of the accused may plead for the accused in the latter's absence, unless, where the accused is not a corporation, the court requires the accused to plead personally.

## RECOMMENDATION

When to Arraign and Plead, and Postponement of Plea

**20. (1) A person charged with a crime punishable by two years' imprisonment or less should be permitted to be arraigned and to plead on first appearance, but otherwise should be arraigned and should plead on second appearance or on a date fixed by the judge at first appearance.**

**(2) A person charged with a crime punishable by more than two years' imprisonment, after making an election as to preliminary inquiry and mode of trial, should**

**(a) if the election is to be tried by a judge without a preliminary inquiry being held, plead before the judge; or**

**(b) if the election is to have a preliminary inquiry, plead before the trial judge if a determination has been made at the conclusion of the preliminary inquiry that the accused be committed to stand trial.**

**(3) A judge who believes that the accused should be allowed further time to plead should be permitted to adjourn the proceedings to a later time in the session or sittings of the court, or to the next or any subsequent session or sittings of the court, upon such terms as the judge considers proper.**

Commentary

This recommendation sets out the time at which a person is first required to be arraigned on and to plead to a crime charged. Ewaschuk summarizes the present practice as follows:

> An accused is generally arraigned on the charge contained in an information on his first appearance in court. If he pleads not guilty or if a preliminary inquiry is held,

> the accused will later be rearraigned at his trial on an information or indictment, depending on the level of court he is in.[224]

Barton and Peel discuss the actual requirements of the law in these terms:

> Plea may only be entered before a judge who has the power to conduct a trial on the charge pleaded to. Thus, where an election to other than trial before a provincial court judge is involved, plea is not taken at that level. The accused will have decided that his plea, for the time being, will be not guilty.[225]

Our recommendation here is based upon the view that an informed plea to the crime charged should take place as soon as possible in the criminal process. The object is to prevent unjustifiable delay caused by uncertainty on the part of the accused as to how to plead, or by the structure of the criminal justice system itself. It should be noted that in Working Paper 59, *Toward a Unified Criminal Court*, we proposed the creation of a unified criminal court that would have jurisdiction to try all crimes.[226] Under this regime there would be no need to restrict the entry of a plea (for example, a plea of not guilty to a murder charge) to a point later in the process before the eventual trial court (the superior court presently has exclusive jurisdiction to try murder cases) because, under our proposed reforms, a judge of the unified criminal court would have jurisdiction to preside over a trial for any crime.

Our proposal here is straightforward. Under subsection (1) the accused, in relation to crimes punishable by two years' or less imprisonment, may plead on first appearance or on a date fixed by the judge at first appearance. It generally parallels a tentative policy for the taking of the election of the accused for a preliminary inquiry, a policy that will be considered in our forthcoming Working Paper on *Trial within a Reasonable Time*.

Subsection (2) sets out when to plead in relation to crimes punishable by more than two years' imprisonment. The crucial issue is that the plea cannot be made prior to the election by the accused whether or not to have a preliminary inquiry. If a preliminary inquiry is asked for, the plea must be taken at the trial, which takes place after the accused has been committed for trial at the end of the preliminary inquiry. Prior to the election of the accused, counsel would merely indicate what the plea may be. The right of the accused to elect, the timing of the election, and other related matters will be considered in more detail in our forthcoming Working Paper on *Trial within a Reasonable Time*.

For clarity, subsection (3) incorporates that part of subsection 606(3) of the *Code* giving the court discretion to postpone the trial to a later time in the sessions or sittings of the court or to the next of any or subsequent sittings, to allow further time for the

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224. E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed. (Aurora, Ont.: Canada Law Book, 1987) at 14-1.

225. P.G. Barton and N.A. Peel, *Criminal Procedure in Practice*, 2d ed. (Toronto: Butterworths, 1983) at 117.

226. LRC, *Toward a Unified Criminal Court*, Working Paper 59 (Ottawa: The Commission, 1989).

accused to plead to the charge. This may occur, for example, where an unrepresented accused, upon being asked, expresses a desire to consult with counsel.

## RECOMMENDATION

Taking the Plea

**21. (1) After reading the charge or after waiver of such reading, the court should ask the accused or, where the accused is not present or is a corporation, counsel or agent appearing on behalf of the accused, to plead not guilty or guilty.**

**(2) Where there is more than one count in an information or indictment [charge document], the accused or, where the accused is not present or is a corporation, counsel or agent appearing on behalf of the accused, should be asked to plead to each count separately.**

**(3) Where the court and the prosecution consent, an accused or counsel or agent of the accused should be permitted to plead in writing or by telephone or other means of communication.**

**(4) Where an accused who is represented by counsel pleads guilty, a judge should normally accept the plea.**

**(5) Where the prosecutor intends to apply to have the accused found to be a dangerous offender following conviction, before accepting a plea of guilty the judge should ascertain that the accused has had prior notice of the application.**

**(6) Where an accused who is unrepresented by counsel or who is represented by an agent who is a lay person pleads guilty, the judge should only accept the plea after addressing the accused personally and determining that the accused:**

**(a) understands that he or she has the choice between pleading not guilty or guilty;**

**(b) understands the nature of the charge;**

**(c) understands that by so pleading, the right to a trial on the charge, the right to have the prosecutor prove guilt beyond a reasonable doubt, and the right to make full answer and defence are waived; and**

**(d) knows the mandatory minimum sentence, if any, for the crime charged.**

**(7) The judge should be able, before any plea of guilty is accepted from an accused and where the judge considers it necessary to do so, to ascertain by questioning whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.**

**(8) The judge should be able, before any plea of guilty is accepted from the accused, to make such inquiry as the judge considers necessary in order to be satisfied that a factual basis for the plea exists.**

**(9) The judge should reject a plea of guilty from an accused if the judge has reasonable grounds to believe that the plea was improperly induced or that no factual basis for the guilty plea exists.**

Commentary

This recommendation in part sets out the other aspect of what has traditionally been known as arraignment: asking the accused to enter a plea. Subsection (1) provides that, after the reading of the charge or after waiver of such reading, the court shall ask the accused, or a counsel or agent appearing on behalf of the accused, to plead not guilty or guilty to the charge. Subsection (2) parallels Recommendation 18(2), that each count be read separately, by requiring that the judge ask that each count be pleaded to separately.

Subsection (3) completes the policy set out in Recommendation 16, which permits an accused or his counsel or agent, in appropriate circumstances, to appear in writing or by telephone or other means of telecommunication. Since an accused is permitted to appear in this way, it follows that he should be allowed to plead on consent using the same methods.

This recommendation also sets out what criteria must be satisfied before the trial judge accepts a plea of guilty. By doing so, it is more comprehensive in scope than the current *Code*, which leaves the determination of such matters to case law. Moreover, it departs from current law in order to provide a greater degree of fairness toward the accused.

Subsection (4) sets out present general practice and procedure by providing that, where the accused is represented, the court must accept the plea of guilty. This, however, is subject to one caveat: following a guilty plea, the Crown usually advises the court of the circumstances surrounding the charge, and if the court determines that the facts as stated do not support the charge, the court may not accept the plea. This policy is now structured in the proposals set out in subsections (8) and (9).

Subsection (5) is meant to alter the law[227] to the effect that failure to give an accused previous notice of an intention to apply to have the court declare the accused a dangerous offender does not affect the legitimacy of the guilty plea. Our concern is that this tactic prevents an accused from knowing about the consequences of a plea that are additional to those normally associated with a guilty plea, namely, a fine or imprisonment imposed solely in relation to the crime charged. Accordingly, this

227. See *R.* v. *Lyons* and *R.* v. *Benoit*, *supra*, note 122.

provision requires that the prosecutor inform the accused prior to plea of an intention to apply to the court to have the accused declared a dangerous offender, and it provides for the court to make inquiries in this regard.

Subsection (6) is designed to ensure additional protection for an accused who is either unrepresented by counsel, or is represented by an agent who is a lay person. In these cases, because the accused apparently lacks legal advice respecting the consequences of a plea, the judge must make additional inquiries before accepting the plea.

Subsection (7) and part of subsection (9) ensure that in all cases where the accused pleads guilty, the judge must determine that the plea was not entered as a result of improper inducements. These subsections are modeled on our Working Paper on *Plea Discussions and Agreements*. There, in the context of negotiated pleas, we criticized the use of the term "voluntariness" as a standard for judging the propriety of accepting a plea. One reason for criticizing its use was that "voluntariness" conceivably imported with it the meaning ascribed to that term in confessions cases — threats or promises made by a person in authority. We argue that this standard is inappropriate in the context of guilty pleas. Accordingly, the concept of an "improper inducement" is used instead.[228] What constitutes an improper inducement depends on the circumstances of the case, and does not necessarily depend on whether or not the accused was represented by counsel. For example, in *R.* v. *Lamoureux*[229] the accused was permitted to withdraw his guilty plea because it was evident that his own counsel had pressured him into pleading guilty. On the other hand, the fact that an accused is unrepresented may taint inducements. For example, in *Cesari* v. *The Queen*[230] the Quebec Court of Appeal ordered the withdrawal of a guilty plea made by an unrepresented accused jailed pending his trial who pleaded guilty to the charge to avoid a week in jail when advised by a peace officer that he would receive only a fine.

Subsections (8) and (9) ensure that in all cases where the accused pleads guilty, the judge may inquire to determine if the facts support the charge made against the accused and that if the facts do not support the charge the judge should refuse to accept the plea. This is modeled on Recommendations 17 and 19(d) of our Working Paper on *Plea Discussions and Agreements*, which sets out this requirement in the context of what is commonly referred to as "plea bargaining."[231] Otherwise a person could be convicted of a crime absent proof of its commission.

No reference is made here to the judge's duty to inquire about plea discussions or agreements between the prosecution and the defence because this issue has already

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228. *Plea Discussions and Agreements, supra*, note 108 at 17-24, 40-41, 61-63.

229. *Supra*, note 119.

230. *Supra*, note 118.

231. *Supra*, note 108 at 56-57, 61-62.

been addressed. In our Working Paper on *Plea Discussions and Agreements*[232] we recommended that plea agreements between an accused and prosecutor be conducted in a manner that ensures fairness toward an accused and that preserves the integrity of the criminal justice system. Among other proposals, the Working Paper required that a judge carefully examine the factual basis for the guilty plea and the substance of and reasons for the plea agreement. In addition, it was proposed that a judge should, in certain circumstances, reject a guilty plea and that an accused who had pleaded guilty should, in such circumstances, be entitled to withdraw his guilty plea.[233]

**RECOMMENDATION**

Failure to Plead

**22. Where an accused fails to plead, the judge should order the clerk of the court to enter a plea of not guilty.**

Commentary

This recommendation does not alter the present law. It merely incorporates subsection 606(2) of the *Code* in simpler language.

**RECOMMENDATION**

Failure to Appear at Trial

**23. (1) Where the crime charged is punishable by more than two years' imprisonment and the accused fails to appear at the commencement of the trial, the court should adjourn the matter and may compel the appearance of the accused by the issuance of a warrant.**

**(2) Where the crime charged is punishable by two years' imprisonment or less and the accused fails to appear at the commencement of the trial, the court should be permitted to:**

**(a) continue the proceedings and render a verdict; or**

**(b) adjourn the proceedings and compel the appearance of the accused by the issuance of a warrant.**

**(3) Where an accused fails to appear during trial, the court should be permitted to:**

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232. Ibid.

233. To see how a guilty plea made pursuant to a plea agreement is to be treated by the courts, see ibid., recs. 12-23 at 52-66.

**(a) continue the proceedings and render a verdict; or**

**(b) adjourn the proceedings and compel the appearance of the accused by the issuance of a warrant.**

**(4) In determining whether to continue or adjourn the criminal proceedings, the court should have regard to:**

**(a) whether counsel for the accused is present;**

**(b) any reasons known to the prosecutor or to counsel for the accused as to why the accused is not present in court;**

**(c) whether a jury has been empaneled;**

**(d) whether substantial inconvenience to witnesses will result if the proceedings are not continued; and**

**(e) the history of the attendance of the accused in relation to the charge.**

Commentary

This recommendation deals with the effect on the criminal proceeding when the accused fails to appear at the commencement of or during trial as required. Under section 650 of the *Code*, an accused must be present in court during the whole of his trial, subject to limited exceptions. However, the *Code* also contains provisions dealing with trial in absentia. For indictable offences, under section 475, if an accused absconds during the course of his trial he is deemed to have waived his right to be present at trial, and the court may continue the trial and proceed to judgment or verdict and impose sentence if he is found guilty or issue an arrest warrant and adjourn the trial to await his appearance. If the trial is adjourned, the court may at any time continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused. Other subsections flesh out additional procedural matters. For summary conviction offences, under subsection 803(2), where a defendant to whom an appearance notice has been issued and confirmed by a justice or who has been served with a summons does not appear at the time and place appointed for the trial, or where a defendant does not appear for the resumption of a trial that has been adjourned in accordance with subsection 803(1), the court may proceed *ex parte* to hear and determine the proceedings or may, if it thinks fit, issue a warrant for the arrest of an accused and adjourn the trial to await his appearance. The wording of this latter section has given rise to problems of interpretation because it refers to only some means of compelling the appearance of an accused at trial (e.g., an appearance notice), not all such means (e.g., an undertaking).

Our proposal improves upon the present law in several ways. First, it merges the trial in absentia provisions into one recommendation. Second, it clearly addresses what happens in relation to all crimes when an accused fails to appear at the commencement of trial as well as when an accused fails to appear during trial. Third, it more precisely structures the judge's discretion in deciding whether or not to proceed with the trial instead of adjourning the trial and issuing an arrest warrant. For example, if the

accused is too ill to attend trial, his counsel could so inform the court and the court would most likely adjourn the trial. Fourth, it avoids problems of interpretation by avoiding references to only some means of compelling appearance at trial.

## RECOMMENDATION

Withdrawal of Plea of Guilty

**24. Following the acceptance of a plea of guilty, the accused should be permitted to withdraw the plea at any time before sentence where the judge has reasonable grounds to believe that:**

**(a) the accused had no prior notice of the prosecutor's intention to make a dangerous offender application;**

**(b) the plea was entered as a result of an improper inducement or without a proper understanding that the accused could choose to plead not guilty to the charge;**

**(c) the accused did not properly understand the nature of the charge or the effects of pleading guilty to it; or**

**(d) the accused did not know the mandatory minimum sentence, if any, for the crime charged.**

Commentary

Occasionally a plea of guilty may be made and accepted that should not have been made or accepted. This proposal clarifies the present law by permitting the accused to withdraw a plea of guilty in circumstances where acting on the plea would be unjust.

Recommendation 24 provides that the accused is entitled to a withdrawal of the plea where it is established that the accused, in effect, suffered prejudice because any of the circumstances outlined in paragraphs (a) through (d) exist.

The effect of this recommendation is to provide a more structured series of rules governing acceptance or withdrawal of a guilty plea and thus to promote consistency, uniformity and fairness in this area of the law.

## RECOMMENDATION

Plea of Guilty to Crimes Arising out of the Same Transaction

**25. (1) Where an accused pleads not guilty to the crime charged but guilty to any other crime arising out of the same transaction, whether or not it is an included crime, the court, provided the prosecutor consents, should be permitted**

**to accept such plea of guilty and, if it is accepted, the court should find the accused not guilty of the crime charged, guilty of the crime in respect of which the plea of guilty was accepted, and should enter those findings in the record of the court.**

**(2) The judge should reject a plea of guilty if the judge has reasonable grounds to believe that the crime to which the accused was pleading guilty inadequately reflects the gravity of the provable conduct of the accused.**

Commentary

Subsection (1) of this recommendation sets out, in slightly modified form, what is now subsection 606(4) of the *Criminal Code*. It adopts the present law that a plea that is not accepted by the prosecutor shall be treated as a nullity.[234]

Subsection (2) sets out the view of the present case law that the judge is not automatically compelled to accept the plea and that he must exercise discretion judicially before accepting the plea. In this regard, it should be noted that subsection 606(4) has already been discussed in the context of our Working Paper on *Plea Discussions and Agreements*. We have adopted here the suggestions for reform of this section made in that Paper and applied them to this more general context.[235]

## RECOMMENDATION

Plea of Guilty to Crimes Committed in Other Jurisdictions

**26. (1) Where a crime is alleged to have been committed elsewhere in the province or in another province, an accused should be permitted to appear before a court or judge that would have jurisdiction to try the crime had it been committed in the place where the accused is, if:**

**(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents; or**

**(b) in any other case, the Attorney General of the province in which the crime is alleged to have been committed consents.**

**(2) Where the accused pleads guilty to that crime, the court or judge should determine the accused to be guilty of the crime and impose the punishment warranted by law.**

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234. For cases to this effect, see *supra*, note 113.

235. Working Paper 60, *supra*, note 108 at 58-62, especially rec. 19 at 61.

**(3) An accused who does not plead guilty and is in custody prior to appearance should be returned to custody and should be dealt with according to law.**

Commentary

This recommendation sets out under what circumstances an accused may plead guilty to crimes committed outside the jurisdiction of the court before which he is appearing. It merges section 478(3) of the *Code*, which deals with the situation in which the accused allegedly committed the crime outside the province in which he is, and section 479, which deals with the situation in which the accused allegedly committed the crime in the province in which he is. Unlike the present law, the recommendation does not exclude from its ambit those crimes presently outlined in section 469 of the *Code* (e.g., murder), since no principled basis for this distinction exists.

## III. Verdicts

### A. General Matters

**RECOMMENDATION**

Codification of Verdicts

**27. Our criminal law should only recognize verdicts expressly set out in the proposed Code of Criminal Procedure (LRC).**

Commentary

Just as this Paper provides that only pleas set out in our proposed Code of Criminal Procedure should be recognized, so too this recommendation makes a similar policy statement about verdicts. Those verdicts to be permitted by our Code are a verdict of not guilty, guilty, or not liable by reason of mental disorder.

Consequently, the verdict of "not proven", permitted in Scotland, does not under our scheme become part of Canadian law. As discussed, this verdict creates a taint to the effect that the accused, though not proved guilty, is not innocent either. It has no place in our system of criminal justice. In addition, consistent with our proposal in Working Paper 35 to repeal the crime of defamatory libel, this recommendation would alter the present law by effectively repealing section 317 of the *Code*, which permits a jury to bring in a special verdict for that crime.

**RECOMMENDATION**

Verdict of Not Guilty

**28. Upon a determination of not guilty being made, the court should enter a verdict of not guilty.**

Commentary

This recommendation sets out the verdict of not guilty, which, as is well known, has the effect of exonerating the accused.

**RECOMMENDATION**

Verdict of Guilty

**29. Upon a determination of guilt being made after trial or upon a plea of guilty entered by an accused before the court, the court should enter a verdict of guilty.**

Commentary

This recommendation sets out the verdict of guilty, pronounced either following a trial on the charge or following acceptance of a guilty plea by the court.

**RECOMMENDATION**

Special Verdict of Not Liable by Reason of Mental Disorder

**30. Where, at the trial of the accused, evidence is adduced that the accused was, by reason of mental disorder, incapable of appreciating the nature or consequences of the conduct or of appreciating that the conduct constitutes a crime, the court, upon finding that the accused engaged in the conduct while under such mental disorder, should enter a verdict of not liable by reason of mental disorder.**

Commentary

Under subsection 614(1) of the *Code*, an accused may be found not guilty by reason of insanity when it is proved that he committed the crime while insane. This recommendation replaces this special verdict with different, more precise language, namely that the accused is not liable by reason of mental disorder. This reflects our

position in Report 31 on *Recodifying Criminal Law*.[236] By its use of the phrase "not liable" instead of "not guilty", the recommendation more accurately conveys the message that although the act was wrongful, the accused is not responsible for having committed the act by reason of mental disorder.

However, there are a variety of issues that attach to the insanity verdict. For example, what is its effect? Should the accused continue generally to be subject to incarceration by virtue of the lieutenant-governor's warrant? Or should the accused be released subject to a post-acquittal hearing to determine whether he should be detained under provincial health legislation on the basis of psychiatric dangerousness, as proposed in our Report 5 on *Mental Disorder in the Criminal Process*?[237] These issues, among others, will be addressed in forthcoming proposals concerning the treatment of the mentally disordered offender in the criminal justice system.

## B. Procedural Matters

### RECOMMENDATION

Conviction for Included Crimes

**31. Every one charged with committing a crime may on appropriate evidence be convicted of committing or attempting to commit any included crime or a crime specified by the statute as an element of one of the alternative ways in which a crime charged may be committed.**

Commentary

Subsection 662(1) of the *Code* provides that where a count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted (*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or (*b*) of an attempt to commit an offence so included.

Recommendations 31 to 33 are linked together to provide a more comprehensive treatment of this area of the law. They are designed to replace section 662. This recommendation sets out that an accused charged with committing a crime may be convicted of committing or attempting to commit an included crime (defined by

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236. *Supra*, note 3, s. 14 at 176. See now the decision of the Supreme Court of Canada in *Chaulk and Morrissette* v. *The Queen* (20 December 1990), which expands the insanity defence to include an incapacity to understand that the conduct was morally wrong.

237. See LRC, *Mental Disorder in the Criminal Process*, Report 5 (Ottawa: Supply and Services Canada, 1977) at 21-22.

Recommendation 32) or a crime specified by the statute as an element of one of the alternative ways in which the crime charged can be committed (set out in Recommendation 33). These two recommendations in turn address certain policy issues about the law on included crimes and suggest a fairer and more logical approach to resolving these issues.

## RECOMMENDATION

Definition of Included Crimes

**32. (1) A crime should be included in the crime charged where:**

**(a) necessarily included in the statutory definition of the crime charged; or**

**(b) the proposed Criminal Code or the proposed Code of Criminal Procedure (LRC) expressly provides that the accused may be alternatively convicted of that crime.**

**(2) A crime should not be included in the crime charged merely because, as a matter of drafting, the charge contains elements beyond those necessary to identify the cognate crime.**

Commentary

This and the following recommendation produce a more understandable definition of what an included crime is. Generally, this recommendation retains the current law. Paragraph (1)(a) retains the ''necessarily included'' test emphasized so much in case law. Paragraph (1)(b) refers to alternative convictions. These alternative convictions are defined in large part in Recommendation 34. For example, Recommendation 34(1) provides in part that a person charged with a crime may on appropriate evidence be convicted of attempting to commit it. Thus, an attempt to commit a crime would fall within the definition of an ''included'' crime. (This is to be distinguished from an attempt to commit an included crime, which is covered by Recommendation 31.)

As already noted, subsections 662(2) through (6) of the *Code* outline specific situations in which crimes are in essence deemed to be included in other crimes. Subsection 662(2) provides that where a count charges first degree murder and the evidence proves instead second degree murder or an attempt to commit second degree murder, the jury may find the accused guilty of second degree murder or of attempt to commit second degree murder. Subsection 662(3) provides that, subject to subsection 662(4), where a count charges murder and the evidence proves instead manslaughter or infanticide, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence. Subsection 662(4) provides that where a count charges the murder of a child or infanticide and the evidence proves instead the commission of a crime under section 243 (concealing the body of a child), the jury may find the accused not guilty

of murder or infanticide, as the case may be, but guilty of an offence under section 243. Subsection 662(5) provides that where a count charges an offence under section 220 (causing death by criminal negligence), 221 (causing bodily harm by criminal negligence) or 236 (manslaughter) arising out of the operation of a motor vehicle or the navigation or operation of a vessel or aircraft, and the evidence instead proves an offence under section 249 (dangerous operation of motor vehicles, vessels and aircraft), the accused may be convicted of an offence under section 249. Subsection 662(6) provides that where a count charges an offence under paragraph 348(1)(*b*) (breaking and entering a place and committing an indictable offence) but the evidence proves instead an offence under paragraph 348(1)(*a*) (breaking and entering a place with intent to commit an indictable offence), the accused may instead be convicted of an offence under paragraph 348(1)(*a*).

However, Recommendation 32(1)(b) avoids listing specific crimes in relation to which, on appropriate proof, a conviction may be entered for other crimes. Instead, it simply provides that a crime is included in another where our proposed Criminal Code or Code of Criminal Procedure expressly provides that the accused may be alternatively convicted of that crime. Under the present *Code* the crimes listed in subsections 662(2) through (6) would be covered by this recommendation. We intend, once our revised Criminal Code is completed, to issue a comprehensive list of the crimes for which alternative convictions for other crimes may be given.

Recommendation 32 marks a significant departure from the present law on included crimes in that, under subsection (2), a crime is not included where it is present in the count only as a matter of drafting. This reflects our previous proposal for reform made in Working Paper 55 on *The Charge Document in Criminal Cases*, where we argued that this kind of implicit liability for such crimes is inconsistent with the degree of notice and fairness to which an accused is entitled in the wording of a charge document.[238] In cases where the prosecutor seeks to impose additional liability, he should lay alternative counts that refer explicitly to these crimes.

The definition of "included crime" set out here is not meant to address the problem addressed in the *Luckett*[239] case, namely: where a crime is specified in the statutory definition of the crime charged as an element of an alternative way of committing it, can the person be convicted of that specified crime instead? This issue is specifically addressed in the next recommendation.

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238. *Supra*, note 139 at 24-27.

239. *Supra*, note 141.

## RECOMMENDATION

Conviction for a Crime Specified as an Element of One of the Alternative Ways in Which a Crime Charged Can Be Committed

**33. A person may be convicted of any crime specified in the statutory definition of a crime charged as an element of one of the alternative ways of committing the crime charged.**

Commentary

This recommendation is designed specifically to tackle the problem of interpretation of included crimes in situations akin to *Luckett* and *R.* v. *Simpson (No. 2)*. It avoids the confusion arising out of the *Luckett* decision, which created doubt as to whether the "necessarily included" test was retained in the circumstances. A crime may be defined so that it can be committed in more than one way, and one of those ways may be defined so as to include committing another crime. For example, in section 343 of the *Code* (robbery), one of the four ways in which robbery is defined is *assaulting* any person with intent to steal from him.[240] The policy issue that arises is whether, given this example, the crime of assault can be said to be necessarily included in the crime of robbery. The Ontario Court of Appeal in *R.* v. *Simpson (No. 2)*[241] held, in effect, that this was the case. However, such a conclusion is problematic. The crime of robbery can, after all, be committed in ways other than by assaulting a person, so not every charge of robbery necessarily includes the crime of assault. Consequently, we have decided to treat statutorily defined included crimes as distinct from other included crimes.

## RECOMMENDATION

Alternative Conviction for Attempt, Furthering, or Attempted Furthering

**34. (1) Every person charged with committing a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.**

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240. Our proposed definition of "robbery" in Report 31, *supra*, note 3, is also defined in a manner that includes a crime within one of the alternative ways of committing it. Section 80 of the proposed draft legislation states at 195:

> 80. (1) Every one commits a crime who, while or for the purpose of committing the crime of theft, uses violence or threatens to use violence against another person or against property.
>
> (2) The crime defined by subsection (1) is aggravated if the accused uses a weapon at the time of the commission of the crime.

241. *Supra*, note 140.

**(2) Every person charged with furthering the commission of a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it, or attempted furthering of it.**

**(3) Every person charged with attempting to commit a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that the person committed the crime or furthered the crime.**

**(4) Every person charged with attempted furthering of a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that the person committed the crime or furthered the crime.**

**(5) Where two or more persons are involved in committing a crime but the evidence does not clearly establish which of them committed the crime and which of them furthered it, all of them may be convicted of furthering the crime.**

**(6) Where two or more persons are involved in attempting to commit a crime but the evidence does not clearly establish which of them attempted to commit the crime and which of them attempted furtherance of the crime, all of them may be convicted of attempted furthering of the crime.**

Commentary

This recommendation is modeled verbatim on section 33 of the Commission's proposed Criminal Code in Report 31 on *Recodifying Criminal Law*.[242] It abolishes sections 660 and 661 of the *Code*, which respectively provide (a) that where a complete crime is charged but only an attempt is proved, there may be conviction for attempt as an included crime, and (b) that where an attempt is charged but the complete crime is proved, there may not be a conviction for the complete crime at that trial.

In Report 31 on *Recodifying Criminal Law*, liability for criminal acts was imposed not only upon a committer of criminal acts and those who attempted such acts but also upon a furtherer, i.e., a person who helped, advised, encouraged, urged, incited or used another person to actually commit a crime, and an attempted furtherer, i.e., a person who did so help, etc., although the criminal conduct was not completed. This rule sets out the alternative convictions possible in these situations. The major change from the present law is our policy decision made in *Recodifying Criminal Law* that where a person is charged with involvement in an incomplete crime and the evidence shows commission of a complete crime, conviction is allowed only for involvement in the incomplete crime at half the penalty provided for the complete crime.[243]

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242. *Supra*, note 3, s. 33 at 180-81.

243. Ibid. at 47-48.

## RECOMMENDATION

Motion for Verdict of Not Guilty

**35. (1) At the close of the Crown's case, the accused should be permitted to move for a verdict of not guilty on the crime charged.**

**(2) Where satisfied that there is no evidence of the crime charged, the judge should enter a verdict of not guilty.**

**(3) When there has been a verdict of not guilty on the crime charged, the trial should be permitted to proceed on any other charge or included crime not affected by the verdict.**

Commentary

This recommendation generally incorporates the present law on directed verdicts. Subsection (1) sets out when a motion for a verdict of not guilty (a term that we use in place of "directed verdict") may be made. It provides, as does the present law, that the accused may move for a verdict of not guilty at the close of the Crown's case.

Subsection (2) provides that where there is no evidence of the crime charged, the judge shall, on motion, enter a verdict of not guilty. This test continues the thrust of recent Supreme Court decisions: the judge must be careful not to intrude into the province of the jury. Hence, our intention is that this test would be interpreted in light of the *Mezzo*[244] and *Monteleone*[245] cases, which were discussed earlier.

At the same time, this test does propose a change to the present law. It proposes that on a jury trial, where there is no evidence of the crime charged, the judge, instead of directing the jury to acquit the accused, should discharge the jury and enter a verdict of not guilty. In this way, the judge is not obligated to delay proceedings by awaiting the jury's decision, nor is the risk run that the jury will disregard the judge's direction.

Subsection (3) ensures that where there is a verdict of not guilty made in relation to the crime charged, the trial may proceed in relation to any other crime charged or to an included crime not affected by the verdict (e.g., where there is a verdict of not guilty on a first degree murder charge, the trial can proceed on a second degree murder charge).

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244. *Supra*, note 146.

245. *Supra*, note 147.

## RECOMMENDATION

Taking a Jury Verdict

**36. The taking of a jury verdict should be permitted to be made on any day of the week.**

Commentary

This recommendation merely restates in a simpler form the present law set out in *Code* section 654, i.e., that no jury verdict is invalid by reason only that it is made on Sunday or a holiday.

# SUMMARY OF RECOMMENDATIONS

## Prosecution for Each Crime Permitted Unless Rules against Double Jeopardy Apply

**1. Where the conduct of an accused with respect to the same transaction makes its possible to establish the commission of more than one crime, it should be possible to prosecute the accused for each crime, subject to the following recommendations protecting against double jeopardy.**

## Rule against Separate Trials

**2. (1) Unless otherwise ordered by the court in the interests of justice — such as preventing prejudice — or unless the accused acquiesces in a separate trial, an accused should not be subject to separate trials for multiple crimes charged or for crimes not charged but known at the time of the commencement of the first trial that:**

**(a) arise from the same transaction;**

**(b) are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others);**

**(c) are part of a common scheme or plan; or**

**(d) are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s).**

**(2) When the accused is unrepresented, the express consent of the accused to separate trials should be obtained.**

**(3) In assessing whether it is in the interests of justice to have separate trials, a court should be permitted to consider, among other factors:**

**(a) the number of charges being prosecuted;**

**(b) whether the effect of the multiple charges would be to raise inconsistent defences;**

**(c) whether evidence introduced to support one charge would prejudice the adjudication on the other charge(s);**

**(d) whether the case is to be tried by a judge alone or with a jury; and**

**(e) the timing of the motion for severance.**

No Subsequent Trial for the Same or Substantially the Same Crime

**3. (1) An accused should not be tried for the same or substantially the same crime for which the accused has been acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned.**

**(2) An accused should not be tried for a crime that was included in the crime of which the accused was acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned, or that was an element of one of the alternative ways specified by statute of committing the crime of which the accused was acquitted, convicted, discharged or pardoned.**

**(3) An accused should not be tried for a crime if the accused has been previously acquitted or convicted, discharged pursuant to what is currently section 736(1), or pardoned in relation to a crime included in, or specified by statute as an element of, one of the alternative ways of committing that crime.**

Rule against Multiple Convictions

**4. (1) Where an accused is charged with more than one crime arising out of the same transaction, it should be possible to register a conviction against the accused for only one of the crimes charged, where:**

**(a) the other crimes are included in, or are specified by the statute as elements of alternative ways of committing, the crime upon which the conviction has been registered;**

**(b) the other crimes consist only of a conspiracy to commit the crime upon which the conviction has been registered;**

**(c) the other crimes are, in the circumstances, necessarily encompassed by the crime upon which the conviction has been registered;**

**(d) the other crimes are alternatives to the crime upon which the conviction has been registered;**

**(e) the crimes differ only in that the crime upon which the conviction has been registered is defined to prohibit a designated kind of conduct generally and the other crimes to prohibit specific instances of such conduct; or**

**(f) the crimes charged constitute a single, continuous course of conduct that the statute defines as a single, continuing crime.**

**(2) This rule should not apply when the statute expressly provides for a conviction to be registered for more than one crime, or, in the case of a continuing course of conduct, where the law provides that specific periods of such conduct constitute separate crimes.**

## Inconsistent Judgments

**5. (1) A prosecution for a crime should be barred if a conviction or acquittal on a charge at a former trial necessarily required a determination of a factual or legal issue inconsistent with the determination of an identical issue that must be made in order for a conviction to be made on a different charge at a subsequent trial of the same accused.**

**(2) Recommendation 5(1) should not apply to a subsequent trial for perjury [perjury or making other false statements] if proof of the crime is made by calling additional evidence not available through the use of reasonable diligence at the time of the first trial.**

**(3) Nothing in these recommendations should be seen as preventing the courts from further developing the law on inconsistent judgments.**

## Effect of Foreign Judgments

**6. (1) Where a person is charged in Canada with the same or a substantially similar crime for which the person was acquitted or convicted by a court of competent jurisdiction in a foreign state, the foreign acquittal or conviction should have the same effect as a judgment in Canada if:**

**(a) the foreign state took jurisdiction over the crime and the accused on the same or similar basis as could have been exercised by Canada; or**

**(b) Canada acquiesced in the claim by the other state to jurisdiction.**

**(2) For purposes of subsection (1), where a person has been convicted in his absence by a court outside Canada and was not, because of such absence, in peril of suffering any punishment that the court has ordered or may order, the court in Canada should have the power to disregard that conviction and proceed with the trial in Canada.**

**(3) A foreign conviction should not include a judgment made in the absence of the accused that would be annulled upon the return of the accused so that a trial on the charge could then proceed.**

## Application of Rules against Double Jeopardy to Federal Offences

**7. Where an act or omission is punishable under more than one Act of Parliament, and unless a contrary intention appears, the offender could be subject to proceedings under any of those Acts, but should not be liable to be punished more than once for that act or omission.**

Abuse of Process

**8. Nothing in this Part should limit the power of a court to stay any proceedings on the ground that they constitute an abuse of the process of the court.**

Double Jeopardy Issues May Be Raised in Pre-Trial or Trial Motions

**9. (1) Challenges to the validity of criminal proceedings involving double jeopardy should be capable of being raised either by way of pre-trial motion or as trial motions.**

**(2) Any issue involving double jeopardy may, in the discretion of the trial court, be disposed of before or after plea is entered.**

Effect of Pre-Trial or Trial Motions on Double Jeopardy Issues

**10. Where double jeopardy issues are decided in favour of the accused, the court, subject to Recommendation 12, should terminate the prosecution on the relevant charge by means of a termination order.**

Evidentiary Matters to Determine Whether the Person Has Been Previously Acquitted or Convicted of the Same Crime

**11. Where a double jeopardy issue under Recommendation 3 is being tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court on the charge that is pending before that court, should be admissible in evidence to prove or to disprove the identity of the charges.**

Effect on Verdicts When the Rule against Multiple Convictions Applies

**12. (1) Where an accused pleads not guilty to more than one crime arising out of the same transaction and where the rule against multiple convictions applies, the accused:**

**(a) if acquitted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should be convicted of the crime equal or closest to it in terms of gravity or seriousness; or**

**(b) if convicted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should have a verdict of conviction pronounced, but not entered, on the other crimes, and a conditional stay should be entered in relation to those crimes.**

**(2) If the accused, having been charged with more than one crime, pleads guilty to a crime charged other than the one the prosecution wishes to prosecute, the plea should be held in abeyance until a verdict on the prosecution's charge has been pronounced and, if the rule against multiple convictions applies, the accused:**

**(a) if acquitted of the crime for which the prosecution seeks a conviction, should be convicted of the crime for which the accused pleaded guilty; or**

**(b) if convicted of the crime for which the prosecution seeks a conviction, should have a verdict of conviction pronounced, but not entered, against him or her for the crime in relation to which the plea of guilty was entered, and a conditional stay should be entered in relation to such crime.**

## Codification of Pleas

**13. Only those pleas expressly set out in the proposed Code of Criminal Procedure (LRC) should be recognized.**

## Plea of Not Guilty or Guilty

**14. An accused who is called upon to plead to a crime charged should plead not guilty or guilty.**

## Defences under the Plea of Not Guilty

**15. Any defence set out in the proposed Criminal Code (LRC) should be permitted to be relied upon under the plea of not guilty.**

## Who Appears

**16. (1) Where the crime charged is punishable by more than two years' imprisonment, the accused should appear in court in person or, where the accused, the court and the prosecutor consent, in writing or by telephone or other means of communication.**

**(2) Where the crime charged is punishable by two years' imprisonment or less, the accused, without having to obtain prior consent, should be allowed to appear in person, by counsel or agent, in writing, or by telephone or other means of communication, unless the court requires the accused to appear in person.**

**(3) If the accused is a corporation, the corporation should appear by counsel or agent for the corporation, and**

**(a) where the crime is punishable by more than two years' imprisonment, counsel or agent should appear in court in person or, where counsel or agent,**

**the court and the prosecution consent, in writing, or by telephone or other means of communication; or**

**(b) where the crime charged is punishable by two years' imprisonment or less, counsel or agent, without the need to obtain prior consent, should be allowed to appear in person, in writing, or by telephone or other means of communication;**

**unless the court requires the counsel or agent to appear in person.**

Failure to Appear at a Scheduled Appearance

**17. (1) Where an accused is charged with a crime punishable by more than two years' imprisonment and fails to appear on a scheduled appearance date other than for trial, the court should adjourn the matter and may compel the appearance of the accused by the issuance of a warrant.**

**(2) Where an accused is charged with a crime punishable by two years' imprisonment or less and fails to appear on a scheduled appearance date other than for trial, the court may proceed to fix a date for trial or may adjourn the matter, and may compel the appearance of the accused by the issuance of a warrant.**

Reading the Charge

**18. (1) When an accused appears in court to plead to the charge, the accused should be called and the substance of the charge should be read.**

**(2) Where there is more than one count in an information or indictment [charge document], each count should be read separately to the accused.**

**(3) Where the accused appears by counsel or agent because the accused is not present or is a corporation, the substance of each charge should be read to the counsel or agent.**

**(4) The accused or counsel or agent of the accused should be permitted to waive the reading of the charge, and in its stead the court, when asking the accused or counsel or agent of the accused to plead, should state the general nature of the charge in summary form.**

**(5) Any waiver of the reading of charges should be informed.**

## Who Pleads

**19. (1) Where the crime charged is punishable by more than two years' imprisonment, the accused should plead personally.**

**(2) Where the crime charged is punishable by two years' imprisonment or less, the accused should be permitted to plead personally or by counsel or agent, unless the court requires the accused to plead personally.**

**(3) Where the accused is a corporation, the plea should be entered by counsel or agent for the corporation.**

## When to Arraign and Plead, and Postponement of Plea

**20. (1) A person charged with a crime punishable by two years' imprisonment or less should be permitted to be arraigned and to plead on first appearance, but otherwise should be arraigned and should plead on second appearance or on a date fixed by the judge at first appearance.**

**(2) A person charged with a crime punishable by more than two years' imprisonment, after making an election as to preliminary inquiry and mode of trial, should**

**(a) if the election is to be tried by a judge without a preliminary inquiry being held, plead before the judge; or**

**(b) if the election is to have a preliminary inquiry, plead before the trial judge if a determination has been made at the conclusion of the preliminary inquiry that the accused be committed to stand trial.**

**(3) A judge who believes that the accused should be allowed further time to plead should be permitted to adjourn the proceedings to a later time in the session or sittings of the court, or to the next or any subsequent session or sittings of the court, upon such terms as the judge considers proper.**

## Taking the Plea

**21. (1) After reading the charge or after waiver of such reading, the court should ask the accused or, where the accused is not present or is a corporation, counsel or agent appearing on behalf of the accused, to plead not guilty or guilty.**

**(2) Where there is more than one count in an information or indictment [charge document], the accused or, where the accused is not present or is a corporation, counsel or agent appearing on behalf of the accused, should be asked to plead to each count separately.**

(3) Where the court and the prosecution consent, an accused or counsel or agent of the accused should be permitted to plead in writing or by telephone or other means of communication.

(4) Where an accused who is represented by counsel pleads guilty, a judge should normally accept the plea.

(5) Where the prosecutor intends to apply to have the accused found to be a dangerous offender following conviction, before accepting a plea of guilty the judge should ascertain that the accused has had prior notice of the application.

(6) Where an accused who is unrepresented by counsel or who is represented by an agent who is a lay person pleads guilty, the judge should only accept the plea after addressing the accused personally and determining that the accused:

(a) understands that he or she has the choice between pleading not guilty or guilty;

(b) understands the nature of the charge;

(c) understands that by so pleading, the right to a trial on the charge, the right to have the prosecutor prove guilt beyond a reasonable doubt, and the right to make full answer and defence are waived; and

(d) knows the mandatory minimum sentence, if any, for the crime charged.

(7) The judge should be able, before any plea of guilty is accepted from an accused and where the judge considers it necessary to do so, to ascertain by questioning whether any inducement to plead guilty, other than an inducement disclosed as part of a plea agreement, has been offered to the accused.

(8) The judge should be able, before any plea of guilty is accepted from the accused, to make such inquiry as the judge considers necessary in order to be satisfied that a factual basis for the plea exists.

(9) The judge should reject a plea of guilty from an accused if the judge has reasonable grounds to believe that the plea was improperly induced or that no factual basis for the guilty plea exists.

### Failure to Plead

22. Where an accused fails to plead, the judge should order the clerk of the court to enter a plea of not guilty.

## Failure to Appear at Trial

**23. (1) Where the crime charged is punishable by more than two years' imprisonment and the accused fails to appear at the commencement of the trial, the court should adjourn the matter and may compel the appearance of the accused by the issuance of a warrant.**

**(2) Where the crime charged is punishable by two years' imprisonment or less and the accused fails to appear at the commencement of the trial, the court should be permitted to:**

**(a) continue the proceedings and render a verdict; or**

**(b) adjourn the proceedings and compel the appearance of the accused by the issuance of a warrant.**

**(3) Where an accused fails to appear during trial, the court should be permitted to:**

**(a) continue the proceedings and render a verdict; or**

**(b) adjourn the proceedings and compel the appearance of the accused by the issuance of a warrant.**

**(4) In determining whether to continue or adjourn the criminal proceedings, the court should have regard to:**

**(a) whether counsel for the accused is present;**

**(b) any reasons known to the prosecutor or to counsel for the accused as to why the accused is not present in court;**

**(c) whether a jury has been empaneled;**

**(d) whether substantial inconvenience to witnesses will result if the proceedings are not continued; and**

**(e) the history of the attendance of the accused in relation to the charge.**

## Withdrawal of Plea of Guilty

**24. Following the acceptance of a plea of guilty, the accused should be permitted to withdraw the plea at any time before sentence where the judge has reasonable grounds to believe that:**

**(a) the accused had no prior notice of the prosecutor's intention to make a dangerous offender application;**

**(b) the plea was entered as a result of an improper inducement or without a proper understanding that the accused could choose to plead not guilty to the charge;**

**(c) the accused did not properly understand the nature of the charge or the effects of pleading guilty to it; or**

**(d) the accused did not know the mandatory minimum sentence, if any, for the crime charged.**

## Plea of Guilty to Crimes Arising out of the Same Transaction

**25. (1) Where an accused pleads not guilty to the crime charged but guilty to any other crime arising out of the same transaction, whether or not it is an included crime, the court, provided the prosecutor consents, should be permitted to accept such plea of guilty and, if it is accepted, the court should find the accused not guilty of the crime charged, guilty of the crime in respect of which the plea of guilty was accepted, and should enter those findings in the record of the court.**

**(2) The judge should reject a plea of guilty if the judge has reasonable grounds to believe that the crime to which the accused was pleading guilty inadequately reflects the gravity of the provable conduct of the accused.**

## Plea of Guilty to Crimes Committed in Other Jurisdictions

**26. (1) Where a crime is alleged to have been committed elsewhere in the province or in another province, an accused should be permitted to appear before a court or judge that would have jurisdiction to try the crime had it been committed in the place where the accused is, if:**

**(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents; or**

**(b) in any other case, the Attorney General of the province in which the crime is alleged to have been committed consents.**

**(2) Where the accused pleads guilty to that crime, the court or judge should determine the accused to be guilty of the crime and impose the punishment warranted by law.**

**(3) An accused who does not plead guilty and is in custody prior to appearance should be returned to custody and should be dealt with according to law.**

## Codification of Verdicts

**27. Our criminal law should only recognize verdicts expressly set out in the proposed Code of Criminal Procedure (LRC).**

## Verdict of Not Guilty

**28. Upon a determination of not guilty being made, the court should enter a verdict of not guilty.**

## Verdict of Guilty

**29. Upon a determination of guilt being made after trial or upon a plea of guilty entered by an accused before the court, the court should enter a verdict of guilty.**

## Special Verdict of Not Liable by Reason of Mental Disorder

**30. Where, at the trial of the accused, evidence is adduced that the accused was, by reason of mental disorder, incapable of appreciating the nature or consequences of the conduct or of appreciating that the conduct constitutes a crime, the court, upon finding that the accused engaged in the conduct while under such mental disorder, should enter a verdict of not liable by reason of mental disorder.**

## Conviction for Included Crimes

**31. Every one charged with committing a crime may on appropriate evidence be convicted of committing or attempting to commit any included crime or a crime specified by the statute as an element of one of the alternative ways in which a crime charged may be committed.**

## Definition of Included Crimes

**32. (1) A crime should be included in the crime charged where:**

**(a) necessarily included in the statutory definition of the crime charged; or**

**(b) the proposed Criminal Code or the proposed Code of Criminal Procedure (LRC) expressly provides that the accused may be alternatively convicted of that crime.**

**(2) A crime should not be included in the crime charged merely because, as a matter of drafting, the charge contains elements beyond those necessary to identify the cognate crime.**

### Conviction for a Crime Specified as an Element of One of the Alternative Ways in Which a Crime Charged Can Be Committed

**33. A person may be convicted of any crime specified in the statutory definition of a crime charged as an element of one of the alternative ways of committing the crime charged.**

### Alternative Conviction for Attempt, Furthering, or Attempted Furthering

**34. (1) Every person charged with committing a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.**

**(2) Every person charged with furthering the commission of a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it, or attempted furthering of it.**

**(3) Every person charged with attempting to commit a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that the person committed the crime or furthered the crime.**

**(4) Every person charged with attempted furthering of a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that the person committed the crime or furthered the crime.**

**(5) Where two or more persons are involved in committing a crime but the evidence does not clearly establish which of them committed the crime and which of them furthered it, all of them may be convicted of furthering the crime.**

**(6) Where two or more persons are involved in attempting to commit a crime but the evidence does not clearly establish which of them attempted to commit the crime and which of them attempted furtherance of the crime, all of them may be convicted of attempted furthering of the crime.**

### Motion for Verdict of Not Guilty

**35. (1) At the close of the Crown's case, the accused should be permitted to move for a verdict of not guilty on the crime charged.**

**(2) Where satisfied that there is no evidence of the crime charged, the judge should enter a verdict of not guilty.**

**(3) When there has been a verdict of not guilty on the crime charged, the trial should be permitted to proceed on any other charge or included crime not affected by the verdict.**

## Taking a Jury Verdict

**36. The taking of a jury verdict should be permitted to be made on any day of the week.**